A

DISCOURSE

CONCERNING THE

ILLEGALITY

OF THE LATE

Ecclesiastical Commission,

In ANSWER to the

VINDICATION and DEFENCE of it:

Wherein the true Notion of the

LEGAL SUPREMACY

Is CLEARED;

And an Account is given of the

Nature, Original, and Mischief

OF THE

DISPENSING POWER.

LONDON,

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AN

Advertiſement.

THIS *Diſcourſe concerning the* Illegality *of the Late* Eccleſiaſtical Commiſſion, *was written when the Author of it was ſummoned to appear before it; and was in continual Expectation of undergoing its Cenſure, for not Complying with the Orders of it. This put him upon an Enquiry into the Grounds on which it ſtood.*

From whence he proceeded to ſearch into the True Notion *of the* Legal Supremacy; *and finding it very imperfectly ſet down in the famous* Fifth Report, De Jure Regis Eccleſiaſtico, *he took the Pains to Examin it through every Reign, there mentioned; and upon the whole Matter he finds him and his Adverſary* F. P. *equally miſtaken. But in the Management of it he hath rather endeavoured to give Light to the Thing, than to diſcover any Mans Errors. And it is hardly poſſible to ſettle the*

Notion *of it aright, without conſidering the* Practice *of other Countries, as well as our own: Of both which the Reader will find a ſhort but impartial Account; which I believe the Author could more eaſily have inlarged, than have brought it into ſo narrow a Compaſs.*

By this, I hope, the World will ſee, That it was not Humor *or* Faction, *but a real and well-grounded* Diſſatisfaction, *which made thoſe of the* Church *of* England *oppoſe the* Proceedings *of that Time; and that ſuch have as great and real a Zeal for the* Ancient *and* Legal Conſtitution *of our Government, as thoſe who make a greater* Noiſe *and* Clamor *about it; and that, not upon any new* Notions *or* Phraſes, *but upon the very ſame Grounds which our Anceſtors made uſe of; and carry in them the true* Baſis *of our* Engliſh *Government. It is poſſible ſome worthy Men may have carried ſome Notions beyond our* Legal Conſtitution; *but the more they ſearch into it, the better Opinion they will have of it. Which, I think, is ſo well ſetled, that every* Deviation *from it tends to our Ruin.*

As to the Diſpenſing Power, *the Author hath inlarged that Part, ſince ſome late Diſcourſes have been publiſhed, both for and againſt it. He hath neglected nothing which hath been moſt plauſibly pleaded for it; but hath given a full Anſwer to the moſt material Inſtances which have been inſiſted on, in behalf of it. And after all,*

I cannot

I cannot but conclude, That the Diſpenſing Power *is a kind of* Mental Reſervation, *which quite alters the Meaning and Deſign of a Law.*

When the Late Eccleſiaſtical Commiſſion *was* ſuperſeded *(if not* diſſolved *) the Author laid by theſe Papers as Uſeleſs; but having communicated them to one Particular Friend, (whoſe* Judgment *and* Authority *he had a great Regard to) he hath been prevailed with by him, to make them Publick at this Time: It being ſtill neceſſary to ſhew, with what Juſtice and Reaſon, we refuſed to own the* Juriſdiction *of it. And it ſeems to me as hard to reconcile it to our Laws, as* Liberty *of* Conſcience *to the Principles of* Popery, *or the* Worſhip *of* Images *to the* Second Commandment.

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THE LEGALITY OF THE COURT OF Eccleſiaſtical Commiſſion Stated and Argued;

In ANSWER to the VINDICATION and DEFENCE of it.

CHAP. I.

The State of the Queſtion concerning the Court of the late Eccleſiaſtical Commiſſion.

The Caſe ſtands thus;

BY the *Act* of 1 *Eliz.* 1. it was *eſtabliſhed and enacted, That ſuch Juriſdictions, Priviledges, Superiorities and Prehemi-nencies Spiritual and Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical Power or Authority, have heretofore been or may lawfully be exerciſed or uſed for the Viſitation of the Eccleſiaſtical State and Perſons, and for Reformation, Order and Correction of the ſame, and of all manner of Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts and Enormities, ſhall for ever by this preſent Parliament be united and annexed to the Imperial Crown of this Realm.*

And that the Kings and Queens of this Realm ſhall have full Power and Authority by virtue of this Act by Letters Patents under the great Seal of England, *to aſſign, name and authorize, when and as often as they ſhall think meet and convenient, and for ſuch and ſo long time as they ſhall think meet to exerciſe, uſe, occupy and execute all manner of Juriſdictions, Priviledges and Preheminences in any wiſe, touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within theſe Realms; and to viſit, reform, redreſs, order, correct and amend all ſuch Errors, Hereſies, Schiſms, Abuſes, Offences, Contempts and Enormities whatſoever, which by any manner of Spiritual or Eccleſiaſtical Power, Authority or Juriſdiction can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained or amended to the Pleaſure of Almighty God, the increaſe of Virtue, and the conſervation of the Peace and Unity of this Realm: And that ſuch Perſon and Perſons ſo to be named, authorized and appointed after the ſaid Letters Patents to him or them made and delivered, ſhall have full Power and Authority, by virtue of this Act, and of the ſaid Letters Patents to exerciſe, uſe and execute all the Premiſes, according to the Tenour and effect of the ſaid Letters Patents, any Matter or Cauſe to the contrary, in any wiſe, notwithſtanding.*

But in the *Act* 17 *Car.* 1. *c.* 11. after the recital of this latter Clauſe, theſe words follow, *And whereas by Colour of ſome Words in the aforeſaid Branch of the ſaid Act, whereby Commiſſioners are authorized to execute their Commiſſion, according to the Tenor and Effect of the King's Letters Patents, and by Letters Patents grounded thereupon, the ſaid Commiſſioners have to the great and unſufferable Wrong and Oppreſſion of the King's Subjects, uſed to fine and impriſon them, and to exerciſe Authority not belonging to Eccleſiaſtical Juriſdiction reſtored by that Act; and divers other great Miſchiefs and Inconveniences have alſo enſued to the King's Subjects by occaſion of the ſaid Branch and Commiſſions iſſued thereupon, and the Executions thereof; therefore for the Repreſſing and Preventing of the aforeſaid Abuſes, Miſchiefs and Inconveniences in time to come, Be it enacted by the King's Moſt Excellent Majeſty and the Lords and Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That the aforeſaid Branch, Clauſe, Article or Sentence ſhall from henceforth be repealed, annulled, revoked, annihilated and made void for ever, any thing in the ſaid Act to the contrary, in any wiſe, notwithſtanding.*

Then after a Clauſe relating to *ordinary Juriſdiction*, repealed 13 *Car.* 2. *c.* 12. the Act concludes thus, *And be it further enacted, That from and after the ſaid firſt Day of Auguſt, no new Court ſhall be erected, ordained or appointed within this Realm of* England *or Dominion of* Wales, *which ſhall or may have the like Power, Juriſdiction or Authority as the ſaid High-Commiſſion-Court now hath or pretendeth to have, but that all and every ſuch Letters Patents, Commiſſions and Grants made or to be made by his Majeſty, his Heirs and Succeſſors; and all Powers and Authorities granted or pretended, or mentioned to be granted thereby, and all Acts,*

Sentences

Sentences and Decrees to be made by virtue or colour thereof, ſhall be utterly void and of none effect.

By the *Act*, 13 *Car.* 2. *c.* 12. This Repeal ſtands good in the firſt Proviſo; and in the ſecond Clauſe, where that which concerns *Ordinary Juriſdictions*, is repealed, an Exception is put in, in theſe Words, *Excepting what concerns the High-Commiſſion-Court, or the new erecting ſome ſuch like Court by Commiſſion.*

The Caſe which ariſes from hence, is, Whether theſe Acts of Parliament only take away the Power of *Fining* and *Impriſoning*, from any *Eccleſiaſtical Commiſſion*, granted by the King; ſo that notwithſtanding theſe Repeals, the King may ſtill conſtitute a *Commiſſion* proceeding by *Eccleſiaſtical Cenſures*: And for the ſame Ends which are expreſly mentioned in the Statute repealed, *viz. To exerciſe, uſe, occupy and execute all manner of Juriſdictions, Privileges and Preheminences in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction within this Realm of* England, *and Dominion of* Wales, *and to viſit, reform, order, correct and amend all Abuſes, Offences, Contempts and Enormities whatſoever, which by the Spiritual and Eccleſiaſtical Laws of this Realm, can or may lawfully be reformed, ordered, redreſſed, corrected, reſtrained, or amended, to the Pleaſure of Almighty God, the Increaſe of Vertue, and the Conſervation of the Peace and Unity of this Realm.* Theſe are the *Powers* of the preſent *Commiſſion*, and are the ſame which are mentioned in the Act of *Repeal*, 17 *Car.* 1. *c.* 11. only *Errors, Hereſies and Schiſms*, being left out.

It cannot be denied, That the *Power* of *Fining and Impriſoning*, is moſt expreſly taken away, and that is aſſigned as one Reaſon and Occaſion of repealing the Clauſe of 1 *Eliz.* 1. which eſtabliſhes the Court; but I cannot be ſatisfied, that this was all that was intended by the Act 17 *Car.* 1. *c.* 11. And that for theſe Reaſons:

1. If no more had been intended, then it had been ſufficient to have deſtroyed the *Letters Patents* by which the Power of *Fining and Impriſoning* was granted, without mentioning the *Act* of *Parliament*, which gives no ſuch Power. But the Act of *Repeal*, 17 *Car.* 1. *c.* 12. begins with the *Act* of *Parliament: Whereas in the Parliament holden in the firſt Year of Queen* Eliz. *there was an Act made and eſtabliſhed*, &c. *In which Act, among other things, there is contained one Clauſe, Branch, Article or Sentence, whereby it was Enacted to this effect*, &c. Then follows all the Enacting Clauſe; and after it, the *Abuſes* of the Power, by the *Letters Patents* are reckoned up, *viz. Fining and Impriſoning, and other great Miſchiefs and Inconveniences:* Therefore, *for the repreſſing and preventing of them*, not meerly *the Power to Fine and Impriſon*; but the whole Clauſe, and all things contained in it, are from thenceforth *repealed, annulled, revoked, annihilated, and utterly made void for ever.* What need all this, if no more were deſigned than to take away the *Power of Fining and Impriſoning?* 4 *Inſt.* f. 35. 2

It

4 *Inſt.* f. 325. It is plauſibly argued by the Lord *Coke*, *That the Power to Fine and Impriſon, was not agreeable to the Deſign of the Act.* 1. *Becauſe the Title of it is, An Act reſtoring to the Crown the Ancient Juriſdiction; but the Ancient Juriſdiction Eccleſiaſtical had not a Power to Fine and Impriſon, but proceeded only by Eccleſiaſtical Cenſures.* 2. *Becauſe the Power to reform, order and correct all Errors, Hereſies, &c. was to be ſuch as may be lawfully reformed, corrected, reſtrained, or amended by any manner of Spiritual, Eccleſiaſtical Power, Authority or Juriſdiction, which did not extend to Fine and Impriſonment.* 3. *The Tenor of the Letters Patents was to exerciſe, uſe and execute all the Premiſes. Since therefore the Premiſes go no further than Eccleſiaſtical Juriſdiction, the Letters Patents could give no ſuch Power, being in purſuance of the Act. But it is agreed,* ſaith he, *That before this Act no Man could be puniſhed by Fine and Impriſonment by any Eccleſiaſtical Power, unleſs it were by force of ſome Act of Parliament.* But becauſe the Act ſaith, *They are to uſe and execute all the Premiſes according to the Tenor and Effect of the Letters Patents;* Others have thought, That *the Power to Fine and Impriſon*, being within the *Letters Patents*, the *Act of Parliament* did bear them out in purſuing what was in the Tenor of them.

But in my Opinion, this Matter ought to be a little further cleared; and therefore we muſt diſtinguiſh between the *Original Commiſſion*, and the *Supplemental Power*, added to enforce it. The *Original Commiſſion* extended no farther than *Eccleſiaſtical Juriſdiction*, as is plain from the reading of the *Statute*; and that of it ſelf could go no further than *Eccleſiaſtical Cenſure*. But becauſe of the Circumſtance of that Time, when (as the Lord *Hobart*, in a *M. S.* Diſcourſe of the *High Commiſſion* obſerves) *The Perſons moſt concerned did ſlight the Eccleſiaſtical Cenſures;* therefore it was thought neceſſary in the *Letters Patents* to grant them a new *Commiſſion* to enforce the former, and that extended to *Fine and Impriſonment*: For in the *High Commiſſion* for the Province of *York*, (which is preſerved) diſtinct *Powers* are granted, which are not in the *Act*. For, whereas the *Act* goes no further than the *Eccleſiaſtical Juriſdiction*, the *Commiſſion* gives them Power to proceed after another manner than by *Eccleſiaſtical Cenſures*; for the Words are, *Contumaces autem & Rebelles, ſi quos invenerint, tam per Cenſuras Eccleſiaſticas, quam Perſonarum apprehenſionem, & Incarcerationem*, &c. *ac quæcunque alia Juris Regni noſtri Remedia compeſcendum*, &c. Here we ſee plainly a Conjunction of the *Power* of *Common Law*, added to that of the *High Commiſſion*, by virtue of the *Act* of *Parliament*, and ſo in all probability it was in the *Letters Patents* for the *High Commiſſion* in this *Province*, which bore equal Date with the former.

In Bibliotb. Cotton.

And although the Date of the *High Commiſſion* was before the *Depriving of the Biſhops*, 1 *Eliz.* Yet I ſee no ground for my Lord *Coke*'s Aſſertion, which the Defendant takes for granted, *p.* 13. That *this Commiſſion was firſt granted for depriving the Popiſh Biſhops, and that about Twenty were deprived by it*; whereas in Fact, there

there were but Fourteen deprived, and that for not doing what they had done before in *Henry* the 8th's Time, *viz. for refuſing to take the Oath of Supremacy, which they had all taken in the time of* H. 8. And as far as I can learn, they were not deprived by the *High-Commiſſion*, but by a particular *Commiſſion* for that purpoſe; as appears by the beſt Account we have of it in the *Hiſtorians* who lived neareſt the time. *In the Month of* July, *ſays* Stow, *the old Biſhops of* England, *then living, were called and examined by certain of the Queens Majeſties Council, where the Biſhops of* York, Ely *and* London, *with others, to the Number of Thirteen or Fourteen for refuſing to take the Oath touching the Queens Supremacy and other Articles, were deprived from their Biſhopricks.* What he means by the *other Articles*, I know not; for there ſeem to be no other at that time, for which they could be deprived by Law, but refuſing *the Oath of Supremacy* (and ſo much *Saunders* himſelf owns) for the other faults were not puniſhable with deprivation. The Biſhops being deprived by a ſpecial *Commiſſion* of the Council, *then* ſaith *Stow, Commiſſioners were appointed for all* England; *For* London *Sir* Richard Sackvile, *Dr.* Horn, *Dr.* Huick *and Mr.* Savage, *who called before them divers Perſons of every Pariſh, and ſwore them to enquire and preſent upon certain Injunctions.* With him *Hollingſhead* agrees, only adding *that theſe Commiſſioners were ſent according to an Act paſſed and confirmed laſt Parliament.*

Sand. de Schiſ. 4. 157.

This was the Act for the *High-Commiſion*, which then extended to particular Pariſhes, with ſuch ſuch Powers of the Common Law as are already mentioned, but are not of the *Eſſence* of the *Commiſſion* according to the Act of Parliament, and therefore the taking away thoſe additional Powers doth not deſtroy the *High Commiſſion*; but the Repealing the *Act of Parliament*, on which it was built, takes away any ſuch Court-Proceeding by Eccleſiaſtical Cenſures.

To make this more plain by a Parallel Inſtance; The Court of *Star-Chamber* was taken away at the ſame time the *High-Commiſſion* was, and both determined the ſame day, 17 *Car.* 1. *Aug.* 1.

This Court was erected for *extraordinary Civil Juriſdiction*, as the *High Commiſſion* was for *Spiritual*; but by the Act, 17 *Car.* 1. *c.* 10. it was taken away much in the ſame manner with the Court of *High-Commiſſion*: For there is a Recital of the *Statutes* on which itwas grounded, 3 *Hen.* 7. *c.* 1. 21 *Hen.* 8. *c.* 20. And then it is alledged, That *they had exceeded the Bounds which the Law had given them*, in theſe Words; *But the ſaid Judges have not kept themſelves to the Points limited by the ſaid Statute, but have undertaken to puniſh where no Law doth warrant, and to make Decrees for things having no ſuch Authority, and to inflict heavier puniſhments, than by any Law is warranted.* And ſo, by this very ſame way of Reaſoning which the *Vindicator* uſes, another *Court* of *Star-Chamber* may be ſet up, if it keeps it ſelf within the Bounds of the Statutes. But we are not to judge of

the force of a Law by the particular Reaſon aſſigned, but by the *Enacting Clauſe: Be it Ordained and Enacted by the Authority of this preſent Parliament, That the ſaid Court, commonly called the* Star-Chamber, , *and all Juriſdictions, Power and Authority belonging unto, or exerciſed in the ſame Court,* &c. *be from the firſt of* Auguſt 1641. *clearly and abſolutely diſſolved, taken away and determined.* If another *Star-Chamber* cannot be ſet up with ſome Limitations for *Extraordinary Civil Juriſdictions,* how can another *Eccleſiaſtical Court* for *extraordinary Spiritual Juriſdiction,* which is taken away after the ſame manner? Only the *Act* againſt the *High Commiſſion,* is more expreſs in the Concluſion, againſt *Setting up any other Court with like Power, Juriſdiction or Authority*; for it was then foreſeen, that ſome other Court might be ſet up, with ſome Alterations; and to prevent any thing of that Nature, the laſt Clauſe was annexed.

2. The prohibiting Clauſe, 17 *Car.* 1. *c.* 11. is very conſiderable to the purpoſe. For the Force of the former *Act* was taken away by the Repealing Clauſe; but that was not thought ſufficient to prevent *another Court* riſing up, which might be *like to it.* A Court may be like, although not altogether the ſame: It may be *like* in *Juriſdiction,* although not in a *Power to Fine and impriſon.* But the Act ſaith, That *no new Court ſhall be Erected which ſhall or may have the like Power, Juriſdiction, or Authority, as the ſaid High-Commiſſion now hath, or pretendeth to have; but that all and every ſuch Letters Patents made or to be made by his Majeſty or Succeſſors, and all Powers and Authorities granted, or pretended, or mentioned to be granted thereby, and all Acts, Sentences and Decrees to be made by vertue or colour thereof, ſhall be utterly void and of none effect.* Was all this meant only of ſuch a *Court* as ſhould proceed to *Fine and Impriſon*? Why was not this ſet down in as plain a manner as ſuch a Law required? But we are to obſerve,

1. It not only voids the *Letters Patents,* but declares the *Conſtitution* of the *Court* it ſelf to be *illegal*; but that doth not depend upon the *Power to Fine and Impriſon.* If it had been ſaid, *No New Court ſhall be erected with a Power to Fine and Impriſon,* the Matter had been clear; for a New Court might have been erected proceeding by *Eccleſiaſtical Cenſures,* without a Power to Fine and Impriſon. But the Act takes no notice here of any ſuch Power, but abſolutely forbids any *Court* with the *like Power, Juriſdiction or Authority.* Had the *High-Commiſſion* no *Power, Juriſdiction* or *Authority,* but only *to Fine and Impriſon?* Their *Power and Authority* by Act of Parliament was general, *to reform Abuſes,* &c. In caſe there had been no ſuch Clauſe as *Fining and Impriſoning* in the *Letters Patents,* had there been *no Court, no Power, Juriſdiction* or *Authority* belonging to it? If then there be a *Power, Juriſdiction* or *Authority* of a *High Commiſſion Court,* without a *Power* to *Fine and Impriſon,* then all ſuch *Power* and *Authority* is taken away by the Prohibiting Clauſe.

2. It

2. It forbids the *Juriſdiction* of ſuch a Court: But *Juriſdiction* is quite another thing from a *Power to Fine and Impriſon*. *Juriſdictio*, ſaith *Bracton*, is *Authoritas judicandi, ſive juris dicendi inter partes*; and to the ſame purpoſe *Fleta:* They both diſtinguiſh two kinds of *Juriſdiction*, *Eccleſiaſtical* and *Civil*. *Eccleſiaſtical*, ſaith *Bracton*, is that which belongs to *Eccleſiaſtical Cauſes:* Which ſhews, That they looked on *Eccleſiaſtical Proceedings by Cenſures* as part of the *Eccleſiaſtical Juriſdiction*. The firſt General Exception, ſaith *Fleta*, is againſt the *Juriſdiction* of a *Court*, which is allowed to be made to thoſe *quibus deficit autoritas judicandi*. From hence it appears, That the Power and Authority of medling in Eccleſiaſtical Cauſes, is that which is implied in the *Juriſdiction* of the *Court*; if it hath no *Juriſdiction* it is no Court; if it have *Juriſdiction*, it is void in Law; for the Act of Parliament takes away all *Power*, *Juriſdiction* and *Authority* from any ſuch Court.

Brac. l. 5. c. 1.

Flet. l. 6. c. 37. c. 2.

c. 36. ſect. 5.

3. The Explanatory Act 13 *Car.* 2. *c.* 12. makes this more evident; for there being a Clauſe inſerted 17 *Car.* 1. *c.* 11. which ſeemed to take away the *Ordinary Juriſdiction* of the *Eccleſiaſtical Courts*, it was thought fit to make that *Act* on purpoſe to clear that Matter, by repealing that Clauſe. But that Clauſe being part of the Act which took away the *High-Commiſſion Court*, leſt by ſuch a Repeal the Act it ſelf ſhould be thought repealed, therefore there is only an Exception put in, not barely as to the Old *High-Commiſſion*, but as to the new *erecting* ſome ſuch *like Court* by *Commiſſion:* And a particular *Proviſo* is added, *That neither this Act, nor any thing herein contained ſhall extend or be conſtrued to revive or give force to the ſaid Branch of the ſaid Statute, made in the ſaid firſt Year of the Reign of the ſaid late Queen* Elizabeth, *mentioned in the ſaid Act of Parliament, made in the ſeventeenth Year of the Reign of the ſaid King* Charles; *but that the ſaid Branch of the ſaid Statute made in the ſaid firſt Year of the Reign of the ſaid late Queen* Elizabeth, *ſhall ſtand and be repealed in ſuch ſort, as if this Act had never been made.* Now it ought to be conſidered, That even this Parliament doth not fix upon the *Power to Fine and Impriſon*, to take that away; but upon the *Original Clauſe* in the *Act*, which gave Power to erect ſuch a Court. And this Parliament was zealous to aſſert the *Ordinary Juriſdiction*, and as zealous to prevent any ſuch extraordinary Juriſdictions, as was in the *High-Commiſſion*; which it ſhewed by continuing the Repeal of that Power by which it was eſtabliſhed.

CHAP.

CHAP. II.

The King's Supremacy by Common-Law enquired into; Coke's *fifth Report*, de Jure Regis Ecclesiastico, examined.

Defence of Ecclesiastical Commission, p. 8, 9.

BUT against this it is pleaded with some Appearance of Reason, *That in* Caudry's *Case the Judges resolved, That the Act of the first Year of the late Queen was not introductory of a new Law, but declaratory of the Old; and that the King by the Ancient Law might make such an Ecclesiastical Commission. And since the Act* 13 Car. 2. c. 12. *saith, That we are not to abridg or diminish the King's Supremacy in Ecclesiastical Matters and Affairs; Therefore we are still to suppose, That the King hath a Power by Law to appoint such a Commission for Ecclesiastical Matters.*

This is the Substance of what is pleaded for the *Legality* of the *Court*: And since the Argument is confined to Matter of Law, to clear this Matter, it will be necessary to give an Account of these two things,

I. What the *Ancient Law* was as to this Matter.
II. How far the *Legal Supremacy* is abridged by these Statutes.

I. As to the *Ancient Law* in this matter, It's true that the Lord *Coke*, in *Caudry*'s Case hath endeavoured to prove, That the Statute 1 *Eliz. was not introductory of a new Law, but declaratory of the Old*; but the Instances he produces fall very short of being *Demonstrative Proofs*, as he calls them:

For the true Case is not,

(1.) Whether the King ought not to interpose in *Ecclesiastical Matters*, so far as the Peace and good Government of his Realm was concerned. Nor,

(2.) Whether he might not order things which concerned the Right of *Ecclesiastical Possessions*; as in *Bishopricks*, *Commendams*, *Right of Patronage*, *Pleas of Tiths*, &c. Nor,

(3.) Whether the King, by his Supreme Authority might not limit the Proceedings of ordinary *Ecclesiastical Courts* in Matters concerning *his Crown and Dignity*, by granting Prohibitions. Nor,

(4.) Whether the King by *Common Law* cannot grant a *Commission of Review*, after the Proceedings of the *Ecclesiastical Courts*; which Judge *Hutton* affirmed, *Was all that was determined in* Caudry's *Case*. Nor,

Littleton's Rep. 189.

(5) Whether

(5.) Whether the King in Parliament may not *make Laws* for Reformation of Religion and eſtabliſhing good Order therein. Nor,

(6.) Whether the Supreme *Coactive Juriſdiction* were not always a *Right of the Crown*, however it were in a great Meaſure uſurped by the Pope after *King* John's *Reſignation*.

But, Whether our *Ancient Law* doth give the King a Power, by virtue of his *Eccleſiaſtical Juriſdiction*, to appoint *Commiſſioners* by an extraordinary way of Juriſdiction to proceed *in prima inſtantia*, againſt Perſons by *Eccleſiaſtical Cenſures?* And to prove this I cannot find one ſufficient Example, as I ſhall make appear by a ſhort Account of the *Inſtances* he produces, and the *Eccleſiaſtical Juriſdiction* exerciſed at that time.

In the Time of the Saxons.

In the Saxon Times he brings firſt *an Inſtance of* Kenulphus, King *of* Mercia, *granting an Exemption to the Abbot of* Abingdon: But what does this ſignifie to *Eccleſiaſtical Juriſdiction*, to prove, That the King gave the Abbot an Exemption from the *Temporal Juriſdiction of the Biſhops*? for, in thoſe Days there were great Diſputes between the *Biſhops* and *Abbots* about *the Temporal Juriſdiction over the Lands of their Abbies*; which the *Biſhops* claimed, and the *Abbots* refuſed, and put themſelves under the Protection of Princes and Great Men, as appears by the Councils of *Cloveſhoo* and *Becanceld*, in the time of *Kenulphus*. But *Stamford* puts this Matter out of Diſpute in the Confirmation of the Charter of *Kenulphus*, by *Edwin*, for the Words are, *Quod præfatum Monaſtrium omnis terrenæ ſervitatis eſſet liberum:* And what is this now to *Eccleſiaſtical Juriſdiction?* *Stamford, l. 3. f. 111.*

But we have manifeſt Proof in the *Saxon Times*, That the *Eccleſiaſtical Juriſdiction* was never exerciſed by ſuch a Commiſſion, but that all extraordinary Caſes were diſpatched in *Parliamentary Aſſemblies*, and the *Ordinary Juriſdiction* was exerciſed by the *Archbiſhop* of *Canterbury*, in Chief, and by the reſt of the Biſhops. The firſt extraordinary Inſtance of proceeding againſt an Eccleſiaſtical Perſon, in the *Saxon Times*, was that of Wilfred *Archbiſhop of* York, who becauſe he would not conſent to the making *three Biſhopricks* in his *Province*, was depoſed by *Theodore* Archbiſhop of *Canterbury*, *the King himſelf being preſent, and the great Council of the Nation:* For ſo King *Alfrith* ſaith, that he was *bis à toto Anglorum Concilio damnatus*, as the Words are in *Malmsbury*; and *Eddius*, who lived at that time, ſaith, *That King* Alfrith *gave this Reaſon againſt reſtoring him, becauſe he had been condemned by the Kings his Predeceſſors, with their Council, the Archbiſhop aſſiſting, and himſelf had judged him, cum omnibus pene Britanniæ veſtræ Præſulibus, all the Biſhops, almoſt, being preſent.* *Malmsb. l. 3. f. 152. Edd. vit. Wilfred. c. 55.*

Ibid. c. 45. In the Council of *Neſterfield*, in his Caſe, it is ſaid, *The King was preſent and* Berthwaldus, *Archbiſhop of* Canterbury, cum totius pene Britanniæ Epiſcopis. In the Council at *Nid*, it is ſaid, *ſedentibus Rege & Epiſcopis, cum Principibus eorum in loco Synodali*; which was a *Parliamentary Aſſembly*.

c. 57.

Not long after *Tunbert* was depoſed from his Biſhoprick, but it was, ſaith *Florentius Wigornienſis, congregata Synodo ſub præſentia Regis Egfridi.* The Archbiſhop *Theodore* likewiſe depoſed *Winfred* Biſhop of the *Mercians*, ſaith the ſame Author, after *Bede*, for *ſome Diſobedience*, and conſecrated *Saxulphus*, the firſt Abbot of *Peterborough*, in his Place.

Florent. Wigor. f. 254.

This *Winfred* had been preſent at the Council at *Herudford*, and there conſented to the *Canons* then firſt received in the Engliſh Church; and there they ſubmitted to Eccleſiaſtical Cenſures, upon the Violation of them. *At this Council*, ſaith *Matt. Weſtminſter, were preſent not only all the Biſhops, but all the Kings and Great Men of the Nation*; ſo that the firſt *Canons* were received in a *full Parliament*. One of theſe *Canons* was for *increaſing the Number of Biſhopricks, as the Number of Believers increaſed*: And upon this Canon *Theodore* proceeded againſt both *Wilfred* and *Winfred*: For not long after *Theodore* divided his Biſhoprick into *five*; but it was done, ſaith *Florentius*, *conſenſu ejuſdem Regis & Principum illius*, as *Ina* divided the *Weſtern Province* into *two Biſhopricks*, *Synodali Decreto*, ſaith *Mat. Weſtminſter*, which then was the ſame, as by *Act of Parliament*. And the oppoſing ſuch a Diviſion ſeems to have been the *Crime of Diſobedience*, for which he was deprived by the Archbiſhop: For as *Bede* obſerves of him, *He firſt exerciſed Eccleſiaſtical Juriſdiction over all* England.

Spelm. Concil. p. 154.

Mat. Weſtm. A. G. 673.

Florent. p. 559.

Mat. Weſtm. A. G. 711.

Bed. l. 4. *c.* 2.

In the great Council at *Becanceld*, where King *Withred* was preſent, *A. D.* 694. with his Nobles (*Ducibus & Satrapis in unum glomeratis*) *together with the Clergy*: He there diſowns any *Eccleſiaſtical Juriſdiction*, and leaves it to the Archbiſhop of *Canterbury*; *Metropolitani Epiſcopi eſt Eccleſias Dei regere, gubernare*, &c. and then follows, *Presbyteros, Diaconos eligere, ſtatuere, ſanctificare, firmare & amovere.* And he makes this an inviolable Law, as far as his Words could make it, *Si quis autem Rex poſt nos levatus in Regnum, aut Epiſcopus, aut Abbas vel Comes, vel ulla poteſtas hominum contradicat huic Chartulæ, aut infringere tentaverit, ſciat ſe ſequeſtratum à Corpore & Sanguine Domini*, &c. And after it follows, *Hæc Lex inviolabilis uſque ad conſummationem Sæculi permaneat*, &c.

Spelm. p. 190.

Chronological Vindication. *To. 1. f.* 193.

Mr. *Prynn*, out of his old Kindneſs to the *Archbiſhops of* Canterbury, in his vaſt Heap of *Collections*, would have this rejected as Spurious; but Sir *H. Spelman*, whoſe Judgment was far beyond the others, ſaith, *He had peruſed five MSS. of it, whereof one was with a mixture of Saxon Letters*, and he had no Miſtruſt of its Sincerity. And the Learned and Judicious Editors of the *Decem Scriptores*, Sir *Roger Twiſden* and Mr. *Selden* have thought fit to inſert it after them, out of a *MS.* in *CCC*.

Decem Script. f. 2209.

But

But Mr. *P.* thinks, *it is contradicted by the Council of* Berghamſtead, *about Eccleſiaſtical Affairs, under King* Withred: But I can find nothing like it. It is true, there are Laws made concerning Eccleſiaſtical Matters, by common conſent of the *King, the Nobles and Biſhops*; but the very firſt is *Eccleſia libera ſit fruaturque ſuis judiciis*, &c.

But beſides, in the Great *Council* at *Cloveſho*, where *Æthelbaldus*, King of *Mercia*, was preſent, and *Cutbert*, Arch-Biſhop of *Canterbury*, with the *other Biſhops*, this Charter of *Withred*'s, was read, and approved, and confirmed; with the like Sanction annexed to it. *A. C.* 742. *Decem Script.* p. 2209.

In the *Council* at *Cloveſho*, *A. C.* 787. The extent of the Juriſdiction of the Archbiſhop of *Canterbury* was very much leſſened by the means of *King Offa*, who cauſed another Archbiſhoprick to be ſet up in *Mercia*, and the Archbiſhop of *Canterbury* gave his Conſent, ſaith *Matt. Paris*: But his former Juriſdiction was reſtored in the Council of *Cloveſho*, *A. D.* 803. by a *general Conſent*. But in the former Council the Eccleſiaſtical Juriſdiction was ſtrenuouſly aſſerted, in theſe Words; *Sicut Reges omnibus dignitatibus præſunt, ita & Epiſcopi in his quæ ad Deum attinent*. And in the latter, there is a ſevere denunciation againſt all *that ſhould leſſen the Honour, or take away the Juriſdiction of that See*. *Spelm.* p. 296. P. 324.

From henceforward I find no Diminution of the *Archbiſhop's Ordinary Juriſdiction* through the *Saxon times*. The King had the *Political Supremacy* in him, by which he erected and divided *Biſhopricks*, and nominated *Biſhops*, and ſummoned *Councils*, and confirmed their Proceedings as he ſaw Cauſe; but the *immediate Eccleſiaſtical Juriſdiction* was left to the Archbiſhop of *Canterbury* in the firſt place, and to the reſt of the Biſhops As to any *Publick Acts* which related to *Eccleſiaſtical Affairs*, they were not diſpatched by *particular Commiſſions*, but in the *Parliamentary Aſſemblies*; In which, the cuſtom was, to begin with what related to the Church, and then to proceed to other Buſineſs. Of this *Ingulphus* gives us an Inſtance in *Ceolnothus* Archbiſhop of *Canterbury*; for in the Parliament Aſſembled at *Kingsbury*, *A. C.* 851. *in Hebdomada Paſch.* (which was chiefly aſſembled *pro Regni negotiis*) yet even then, he propoſed, That *Church Affairs might be firſt diſpatched*; *Divina Negotia debere primitus proponi*; to which they all aſſented. And ſo *Bertulphus* his *Charter* of *Crowland* then paſſed; as *Withlafius* his did before, at a time when the Biſhops and Nobles attended the King at *London*, to conſult about the *Daniſh Pyrates*, which very much infeſted our Coaſts. *Ingulph*, p. 490. *C.*

Thus *Æthelwolfus* paſſed his Famous Grant of *the Tenth of all the Lands to the Church, in a Council at* Wincheſter; himſelf, and the *King* of *Mercia* and *Eaſt-Angles*, being preſent, and *all the Nobility and Biſhops giving their free Conſent*; as *Ingulphus* relates it. Several others might be produced; but theſe are ſufficient. And the *Saxon Laws* are a plain Evidence, That *Church-Matters* *Ingulph.* ib.

Matters were in thoſe times determined in the ſame Aſſemblies, wherein the other Laws of the Kingdom were paſſed.

In the Reign of King Edward *the Confeſſor.*

C. 5. R. The next Inſtance is of *Edward* the *Confeſſor*, who ſaith in his Laws, That *he is Vicar of the higheſt King, and he is ordained to this end, that he ſhould Govern and Rule the People of the Land, and above all things, the Holy Church, and that he defend the ſame from Wrong-doers, and root out Workers of Miſchief.*

F. Parſons ſaith, *All this was by Commiſſion from the Pope, ſuch as the Kings of* Sicily *had.*

Anſ. to *Coke's* 5th *Rep.* c. 5. *n.* 20. But in my Opinion, this is a very bad Anſwer: For it ſuppoſes Perſons otherwiſe uncapable, to be made capable of the ſame Juriſdiction, which follows Orders; provided they have a Delegation from the Pope: Which is in effect, to confound all Eccleſiaſtical Juriſdiction in any, but the *Pope* himſelf, and thoſe to whom he commits it. But thoſe who aſſert the *Right* of *Juriſdiction* to follow the *Power* of *Order*, muſt firſt ſuppoſe a Perſon duly qualified, before he can receive from the *Pope* himſelf the Power of *Eccleſiaſtical Juriſdiction.* If therefore a Prince hath not an inherent Right to it, he cannot receive it by *Commiſſion* from the *Pope.* And the Powers which the *King* of *Sicily* challenges, relating to Eccleſiaſtical Juriſdiction, are either ſuch as other Princes have an equal Right to; or elſe they muſt imply ſuch proper *Eccleſiaſtical Juriſdiction* as follows the *Power* of *Order*; and then, how can the *Pope* give the one without the other? Such a Gift is like *an Appropriation of a Benefice with a Cure to a Nunnery*, which the Lord *Hobart* ſaith is *void in Law*, by reaſon of the incapacity of the Perſons. But the *Supremacy* which our Law gives, is not any proper *immediate ſpiritual Juriſdiction*, like that of Biſhops, but an *Authoritative and Legiſlative Supremacy without any foreign Appeals*, as will appear afterwards. But the *Rights* which the Kings of *Sicily* challenge, are theſe. 1. That *they have the ſame Powers which Legates* a Latere *have, and may judge of the ſame Cauſes, and proceed in the ſame manner with Eccleſiaſtical Cenſures.* 2. That *no Appeal lies from the King's Commiſſioner, even to* Rome *it ſelf*; and it is common to appeal from the Cenſure of the Biſhop to him. The former is a *Power*, which our Kings never pretended to, by vertue of their *Supremacy*; for it is a *Delegation* of the *Power of the Keys*; which the Legates *à Latere* exerciſe by vertue of their *Function*, as well as their *Commiſſion*: But the *Legal Supremacy* with us, is a *Right to govern all ſorts of Men by our own Laws, without any foreign Juriſdiction, and that with reſpect to Eccleſiaſtical Matters as well as Temporal.*

Hob. Rep. f. 148.

But to prevent Miſtakes and Cavils about this Matter, it will be neceſſary to clear the *Notion* of *Supremacy*; as it hath been owned and received in the *Church* of *England.*

And

And for this we have two *Authentic* Declarations of it to rely upon.

The first is mentioned, 5 *Eliz.* c. 1. §. 14. Where the *Supremacy* is declared to be taken and expounded in such form as is set forth in the *Admonition* annexed to the *Queens Injunctions* published in the first year of her Reign. And the Words there are, That *the Queen neither doth nor will challenge any Authority, but such as was of ancient time due to the Imperial Crown of this Realm, that is, under God to have the Sovereignty and Rule over all manner of Persons, born within these her Realms, Dominions and Countries, of what Estates, either Ecclesiastical or Temporal soever they be, so as no other foreign Power shall or ought to have any superiority over them.*

The Second is in the 37th Article, wherein it is declared, That *by the Supremacy is meant, that only Prerogative which we see to have been always given to all Godly Princes in Holy Scriptures by God himself, that is, that they should rule all Estates and Degrees committed to their Charge by God, whether they be Ecclesiastical or Temporal, and restrain with the Civil Sword, the stubborn and evil doers.*

So that *granting* a *Commission* for proceeding by *Ecclesiastical Censures*, is no part of that *Supremacy* which our Church owns. And thus the Divines of our Church have understood it. By *the Supremacy*, saith Bishop *Andrews*, *we do not attribute to the King the Power of the Keys, or Ecclesiastical Censures.* *Tortura Torti*, p. 380.

R. Thompson, in his Defence against *Becanus*, saith, *The Supremacy is not to be defined by Ecclesiastical Jurisdiction, but by Supream Government.* Elenchus Refut. Tort. Torti, p. 80.

Becanus urged this as an Argument against the Kings Supremacy, That *he had no Ecclesiastical Jurisdiction.* Dr. *Burrhil* answered, That *the Supremacy implied many other things; as, the Power of calling Convocations, of confirming Canons, of giving Commissions of Delegates, of taking Cognizance of the Misdemeanors of Church-men (as well as others;) but for proper Ecclesiastical Jurisdiction, he denies it to belong to Supremacy.* And after, asserts, That *the King's Supremacy is preserved, if he takes care that those who have the Power of Ecclesiastical Censures, do exercise them*; and not as though it belonged to the Supremacy to give an immediate Power to proceed by Ecclesiastical Censures; which was not supposed to belong to it, but a supreme Right of governing all sorts of Persons by our Laws. *C. Mart. Bec. pro Tort. Torti*, c. 21. p. 234. p. 22. p. 244.

The King's Supremacy in Ecclesiastical Matters, doth not, saith, *Mason, imply the Power of the Keys, which the King hath not; but he may command those who have them, to use them rightly.* *Mason*, De Minist. Angl. l. 3. c. 3. p. 271.

All these wrote in King *James* I. his Reign, when the Point of *Supremacy* was throughly sifted on both sides. And the King himself, who very well understood these Matters, saith, That *the Oath of Supremacy only extended to the King's Power of Judicature, over all Persons as well Civil as Ecclesiastical; excluding all foreign Powers and Potentates to be Judges within his Dominions.* *Apology*, &c. f. 263.

Not as though the King hereby challenged to himſelf a Power of inflicting *Eccleſiaſtical Cenſures* on Perſons; but leaving the *Spiritual Juriſdiction* to thoſe who have *the Power of the Keys*, it belonged to him to exerciſe his *Supreme Authority* over Eccleſiaſtical Perſons and Cauſes, as he did over Temporal. *For,* ſaith Archbiſhop *Bramhal, our Laws never inveſted the King with any Spiritual Power or Juriſdiction, witneſs the Injunctions of Q.* Eliz. *witneſs the Publick Articles of Our Church; witneſs the Profeſſions of King* James; *witneſs all our Statutes themſelves.*

Bramhal's Works, p. 340.

The King of England, ſaith he, *by the Fundamental Conſtitution of the Monarchy, hath plenary Power, without the Licence or Help, or Concurrence of any Foreign Prelate or Potentate, to render final Juſtice, that is, to receive the laſt Appeals of his own Subjects, without any Fear of any Review from* Rome, *or at* Rome, *for all Matters Eccleſiaſtical and Temporal; Eccleſiaſtical by his Biſhops, Temporal by his Judges.*

p. 63.

And thus our Laws were in the Right, when they called the Act of Supremacy, Reſtoring the Rights of the Crown; for if we take away all the Papal Uſurpations as to Appeals, Exemptions of Perſons, Diſpenſations, Proviſions, making Canons, ſending Legates to hold Courts, to call Convocations, &c. *we may eaſily underſtand what the Supremacy is,* viz. *a Power of Governing all Sorts of Men, according to the Laws Eccleſiaſtical and Temporal, without any Foreign Juriſdiction.*

But as in Temporal Matters the King's Supreme Authority is exerciſed in his Ordinary Courts, ſo likewiſe in Eccleſiaſtical: Which deriving their Juriſdiction from the King as Supreme, his Supremacy is preſerved in the ordinary Eccleſiaſtical Courts; but as to extraordinary *Juriſdiction* that depends on the Legiſlative Power; And whether that be not now taken away by it, is the thing in Queſtion.

Having endeavoured to ſet this Matter in as clear a Light as I could, I now return to the Inſtance of *Edward the Confeſſor.*

And thoſe Words of his, as they are in *Hoveden,* ſignifie no more than a *General Right of Protecting* and *Defending the Church,* which is not denied to belong to Kings, where the Pope's Authority is the moſt owned.

I cannot but take notice of a different Reading in the Lord *Cokes* Copy, from all that I have ſeen; for where he hath it, *Sanctam Eccleſiam regat & defendat; Lambard, veneretur & regat;* but *Hoveden, revereatur & ab injuriatoribus defendat:* Which is that *Right of Protection* which is allowed by all. The *Spaniſh Lawyers* hold, *That there lies an Appeal to the Kings Courts, by his Right of Protection, in Caſe of any violent Proceedings in the Eccleſiaſtical Courts.* Which *Violences* are ſo many, as make ſuch Appeals ſo frequent and neceſſary, that whole Volumes have been written about them. And this they ſay, *Is not Introductory of a New Law, but only declaratory of a Natural Right.* The *French Lawyers* allow *Appeals* from the *Eccleſiaſtical Courts, tanquam ab abuſu;* which muſt be founded on an *Original Right* in the

Covarruvias Pract. Quæſt. c. 35. n. 3.

Salgado, De Regia Prot. part 1. c. 1. n. 23.

the King, to defend the Church both from *Injuries* and *Abuſes*. And as to the Church it ſelf, it is fully expreſſed in the Writ *de Excommunicato capiendo*, in theſe Words, *Quia vero Poteſtas Regia Sacroſanctæ Eccleſiæ in querelis ſuis deeſſe non debet.* But ſuch a *Right* of *Protection* and *Aſſiſtance* is different from that of *Juriſdiction*; unleſs it be that which is only Coactive; which is not the Juriſdiction we now enquire into. *Paſq. Recher. l. 3. c. 33.*

But it is moſt conſiderable that King *Edward* ſaith, *He is God's Vicar, and therefore could not look on himſelf as acting by Commiſſion from the Pope.* It is true, that in the third Charter of *Weſtminſter* there is a *Bull* of *Nicholas* the Second, wherein he *gives to the King and his Succeſſors the Protection and Defence of that Place, and of all the Churches of* England, *and a Power, in his ſtead to make good Laws, with the Advice of the Biſhops and Abbots:* But I do not find that King *Edward* owned that he acted in theſe Matters by any *Commiſſion* from the *Pope*, but from *God* himſelf:

And this Law, in *Hoveden* and others overthrows any ſuch pretended *Commiſſion*; And yet the *Pope* himſelf doth not give him a Power to *delegate* his Authority to others, but to act in it himſelf, and that *only with the Advice of Biſhops and Abbots.*

The Point then which was to be proved, was not that the King had a Right to protect the Church from Injuries; but ſuch an *Inherent Right* of *Eccleſiaſtical Juriſdiction*, which he might *delegate* to others, whether *Biſhops or not*, and impower them to proceed by *Eccleſiaſtical Cenſures* againſt Offenders, ſummoned to appear before them. And the Queſtion now is not, Whether by the *Supreme Legiſlative Power of the Nation* ſuch an *Authority* might not in an extraordinary Caſe be Committed to particular Perſons *by Act of Parliament*; but Whether ſuch an *Act of Parliament* being granted to be taken away, the *King* by the *Ancient Law of the Realm* may appoint ſuch *Commiſſioners*, as he thinks fit, Laymen or Biſhops, to proceed againſt the King's Subjects by *Eccleſiaſtical Cenſures?*

And this very ſtating of the Caſe, as it ought to be, ſhews how impertinent the remainder of his Examples are. But to proceed.

In the Reign of King William *the Firſt.*

In the time of *William the Conqueror*, he only mentions a Caſe out of *Fitz-Herbert*, *That he made an Appropriation of Churches with Cure to Eccleſiaſtical Perſons*, viz. *to a Prebend of the Church of* York; *now this*, ſaith he, *was agreed by all could not be done without Eccleſiaſtical Juriſdiction.*

It is too common a Fault in ſome great Lawyers, that what they find once ſetled for Law in their Books, they imagine was never otherwiſe. Thus *Appropriations* after *Dioceſſes* were ſetled, being looked on, as chiefly the *Act* of the *Ordinary*, who is to take Care of the whole Dioceſs; From hence they infer, That in all Times an *Appropriation* muſt argue *Eccleſiaſtical Juriſdiction.*

on. But before the *Parochial Rights* were eſtabliſhed, there were many *Volantary Appropriations* made by particular Perſons, who thought there was no more Eccleſiaſtical Juriſdiction in the *Appropriation* of Churches, than in the *Endowments* of them, and in the *Right* of *Patronage*; only the one is ſetled on a *Spiritual Corporation*, as *perpetual Incumbent*; and the other on *particular Perſons in Succeſſion.* Its true, ſince the Acts for reſtoring *Juriſdiction* to the Crown, the Power of *making Appropriations* in the King, is ſaid to be from his *Supreme Eccleſiaſtical Authority*, *Grindon*'s Caſe, in *Pl. f.* 448. But then we are told, *It was becauſe the Pope, as Supreme Ordinary, had ſuch a Power without the Biſhops*; which Reaſon will not hold as to ſuch Times when the *Pope* was not owned to be *Supreme Ordinary*, as he was not in the *Conqueror*'s Time, the *Canon-Law* not being then received in *England.*

But what a mean Proof is this in ſuch a buſie Time as that of *William the Firſt*, when ſo many great Churchmen were deprived of their Biſhopricks, being *Engliſh*, and the *Normans* put in their Places? Was this done by any *Commiſſion* from *William* to his Great *Lords* and others, to proceed againſt them by *Eccleſiaſtical Cenſures?* nothing like it. *Stigand*, Archbiſhop of *Canterbury*, (if *Spot*'s Story be true) was too great a Friend to the *Engliſh Liberties* to be endured by him: But he was too great a Diſſembler to ſeem to have any thing to do in it himſelf; and therefore knowing he was of the oppoſite Party to the prevailing Pope, he privatly ſends to him, To ſend a *Legate* for that Purpoſe (wherein the Pope and He had their ſeveral Ends); and then in *Parliament Time*, the King keeping his *Eaſter* at *Wincheſter*, *Stigand* was depoſed, and *Agilmarus*, Biſhop of the *Eaſt Angles*, and ſeveral others, *without any evident Reaſon*, ſaith *Hoveden*, *but only to make way for the Normans:* This was in *Concilio Magno*, ſaith he and the reſt, for *Eaſter* was one of the three Seaſons, for the *Parliamentary Meeting*, in the Year; which *William* kept up, in Imitation of the *Saxons*, who at *Chriſtmas*, *Eaſter* and *Pentecoſt* held their *Publick Courts*, and did wear their *Crowns* till the Times of *H.* 2. and then they did diſpatch Publick Affairs: Thus far he complied with the *Saxon Cuſtoms*; but he had a new Work to do: The Archbiſhop he could not rely upon, and therefore was put to find out a new way, by ſending for a *Legate* from the *Pope* to ſerve his turn. And thus *William*, for his own Ends, having ſo hard a Game to play here, called in the *Pope's Aſſiſtance*; who knew well enough how to draw his own Advantage out of it. But *William* would go no further than his Intereſt carried him; for afterwards he declared, *That he would maintain his own Rights, which he enjoyed in* Normandy, viz. *That nothing ſhould be done without him in Convocation*; *no Legate come but as he pleaſed*, &c. But ſtill he ſeemed to let them enjoy their *Saxon Liberties* in Matters of Eccleſiaſtical Proceedings, ſo far as to have them debated *in Parliament.* Thus the Controverſie between the two *Archbiſhops*

Hoveden. f. 259. 2.

Eadmer. f. 6.

was

was referred to *Parliament*, *the King and the Great Men, as well as the Biſhops being preſent*. The Controverſie between *Lanfrank*, Archbiſhop of *Canterbury* and *Odo*, Biſhop of *Baieux* was referred, ſaith *Eadmerus*, to a *Conventus Principum* at *Pinnedenen*; and when the King heard their Reſolution, *cum conſenſu omnium Principum ſuorum confirmavit*, ſaith the *Textus Roſſenſis*. He likewiſe confirmed *Charters* as the *Saxons* had done; that to *Battel Abby* was *Conſilio Epiſcoporum & Baronum meorum*. But the moſt conſiderable thing he did, as to *Eccleſiaſtical Juriſdiction*, was ſeparating the *Courts Eccleſiaſtical* from the *Hundred Courts*, by his *Charter* to *Remigius* and others; *which*, he ſaith, *was granted in a great Council, and by the Advice of the Archbiſhops, Biſhops and all the Great Men of his Kingdom:* So that ſtill extraordinary Acts relating to Church Matters were paſſed in *Parliament* by *General conſent*.

Hoveden, f. 260.

Eadm. f. 9.

Selden. ad Eadm. f. 165.

And what now doth the *Appropriation of a Church with a Cure of Souls* ſignifie to prove his *Eccleſiaſtical Juriſdiction?* When thoſe things in his Time were not brought under ſuch ſtrict Rules as they were afterwards; but *Appropriation* might have been made by any *Lay Perſon*, that never pretended to the leaſt *Eccleſiaſtical Juriſdiction*; and he might as well have brought his demoliſhing ſo many Churches in the *New Foreſt*, for an Inſtance of his *Eccleſiaſtical Juriſdiction*.

In the Reign of William *the Second.*

In *William Rufus* his time, a great Heat aroſe between him and *Anſelm* Archbiſhop of *Canterbury*, about owning the Pope, Whether the *Archbiſhop* could do it without the King's Conſent? the Buſineſs was referred *to Parliament*, which the King called on purpoſe at *Rockingham*, ſaith *Eadmerus*, who was there preſent; *The Biſhops declared they could not deprive him (as the King would have had them) to whom they had promiſed Obedience.* After which it was again referred to *Parliament*; but *Anſelm* not yielding, he went out of the Land.

Eadm. f. 26. *f.* 30, 31. 38.

In the Reign of King Henry *the Firſt.*

In the Reign of *Henry* the Firſt a new Controverſie aroſe between the King and the ſame Archbiſhop, about the Ancient Right of the Crown as to *Inveſtiture of Biſhops*; the King calls a *Parliament about it*, wherein the *Biſhops and Lords joyned with the King*; afterwards *Anſelm* deſired, *The Advice of the Biſhops and Nobles might be heard at* Eaſter; which ſhews that both Sides referred it to the *Parliament*.

Id. f. 65, 66, 70,

In his Time a *Council* was called, and ſeveral *Canons* paſſed, and the Archbiſhop deſired of the King, That the *Primates Regni* might ſit with them; that all things might paſs *utriuſque Ordinis concordi cura*, with *the Conſent of both Eſtates*. The King afterwards takes the Advantage of theſe *Canons*, and proſecutes

67,

the Breakers of them, and raiſes Money upon Pretence of For-
f. 85, feitures, to the great Grievance of the Clergy. *Anſelm* although then in Diſfavour, writes to the King about it; and tells him, This was a new Method of Proceeding, *becauſe it belonged to the Biſhops in their Dioceſſes to call the Clergy to an Ac-*
86, *count*; or if they neglected, *to the Archbiſhop and Primate.* The King Anſwers, *That his Barons were to meet him on* Aſcenſion-
90, day, *and by their Advice he would give an Anſwer*; but upon *Anſelms* Return this Proſecution ceaſed. Other Affairs of the Church were then referred to the *Parliament at Eaſter*, from thence to *Pentecoſt*, and by reaſon of *Anſelm*'s Sickneſs to *Au-*
91, *guſt*; and *then the Biſhops, Abbots and Lords of the Kingdom, met in the King's Palace at* London, *and by Conſent of Parliament, Inveſtiture was turned into Homage.*

95, In his time the *Biſhoprick of Ely* was erected by the King's Conſent in Parliament, *Regi, Archiepiſcopo, cæteriſque Principibus Regni viſum fuit*, ſaith *Eadmerus*. The Conſecration of an elect Arch-
102, biſhop of *York*, was tranſacted in Parliament, *the King adviſing with the Biſhops and Nobles about it*; for *Anſelm*, before his Death had ſent an *Inhibition* to the Biſhops, Not to conſecrate him unleſs he made the Profeſſion of Obedience to the Archbiſhop of *Canterbury*: The Biſhops reſolved to adhere to *Anſelm*'s Inhibition, and the King yielded. After *Anſelm*'s Death, the King
109, adviſed with his *Parliament*, at *Windſor*, about a Succeſſor to him; and the Biſhop of *Rocheſter*, at the Requeſt of the Biſhops, was agreed upon: And the King filled the *Abbies* before he went
110, into *Normandy*, *conſilio Principum & Epiſcoporum ſuorum.*

In the latter End of *Henry* the Firſt many Diſputes hapned about *Eccleſiaſtical Juriſdiction*, as between the Biſhops of S. *Da-*
Hen. Hunt. l. 7. f. 220. 2. *vids* and *Glamorgan* which were debated *in magno Placito apud London*, ſaith *Henry* of *Huntingdon*: And *for ſuch Cauſes*, ſaith he, *another Aſſembly was held in the beginning of* Lent, *and again in* Rogation Week.

In all this time, when the *Norman Kings* aſſerted all the *Rights* of *Sovereignty* with great Zeal, yet they never pretended to appoint any *Commiſſioners* for *Eccleſiaſtical Cauſes*, but ſtill referred them to *Parliaments.*

In the Reign of King Henry *the Third.*

The next Inſtance the Lord *Coke* brings, falls as low as the *Time of* Henry *the Third.* The firſt whereof is, *the King's granting a Writ of Prohibition, if any man ſued in the Eccleſiaſtical Court for any thing of which by Allowance and Cuſtom, it had not lawful Cognizance.* But how doth the *King's Power* of *granting Prohibitions*, prove his *Eccleſiaſtical Juriſdiction*? It effectually proves the *King's Right* to preſerve *his Crown and Dignity*, as the *Prohibition* implies; but how doth it hence appear that the *Eccleſiaſtical Juriſdiction* comes from his *Crown and Dignity*? The contrary ſeems rather to follow, *viz.* That *the Eccleſiaſtical Courts* were held from another Power; but all Matters of

Tempo-

Temporal Cognizance did belong to the Crown. There is no Queſtion but ſince the Acts for reſtoring *Juriſdiction* to the Crown, the ſupream Juriſdsction both in the *Eccleſiaſtical and Civil Courts*, is derived from the Crown. And in whoſe-ſoever *Names* the *Courts* are kept, the *Authority* of keeping them is from the King. For it is declared by Act of Parliament, 1 *Eliz.* 1. 17. *That all Eccleſiaſtical Power is united and annexed to the Imperial Crown of this Realm*; which all Biſhops do own, *in taking the Oath of Supremacy*; and therefore the old Form continuing, can ſignifie nothing againſt the *Law of this Realm* and their own *Oaths*. But as long as the main Points were ſecured by the Laws, there was no neceſſity apprehended of altering the Forms; for, on the other ſide, it was objected, that ſince the Laws had placed all Juriſdiction in the Crown, it ſeemed as unreaſonable to continue the old Form of Prohibitions *in læſionem Coronæ & Dignitatis Regiæ*; how can this be, ſay they, when the *Juriſdiction Eccleſiaſtical* as well as *Civil*, is owned to be from the Crown? It is ſaid in Anſwer, That, *a Prohibition implies that the thing is drawn into* aliud Examen than it ought to be, and this is *contra Coronam & Dignitatem Regiam.* Why not then as well when an *Eccleſiaſtical original Cauſe*, is brought into a *Temporal Court*? for that is *aliud Examen* then, by Confeſſion on that ſide; and if *Eccleſiaſtical Juriſdiction* be derived from the Crown, the *aliud Examen* muſt relate only to *the Court*, and not to *the Crown.* All that I infer from hence is, that the old Forms were thought fit to be continued;& both Parties reconciled them as well as they could to the Laws in force. But the Judges confeſſed, That *although de jure both the Juriſdictions were ever in the Crown, yet the one was ſometimes uſurped by the See of* Rome, whic h is a plain acknowledgment, that by the Matters of Fact in thoſe times, the *Right* could not be proved; and eſpecially in the times of *H.* 3. when the Popes Uſurpations here, were at ſo great a height, that the King upon *Writs* of *Enquiry* ſent into the ſeveral Counties, found, That *the Revenues of the Roman Court, by Proviſions, Extortions*, &c. *exceeded the Kings.* And the King had ſo little Authority left, that the Pope put Biſhops upon him *Rege penitus irrequiſito*, ſaith *Matt. Weſtm.* ſo that he was ſo far from *Eccleſiaſtical Juriſdiction*, that he had not the *Nomination* of his *Biſhops*, nor ſo much as a *Conſent* to their *Election*, unleſs the Pope thought fit ſometimes to gratifie him in it. For the Pope pretended to the *Right* of *Diſpoſal* of *Church Preferments*, by Vertue of his *Ordinary Juriſdiction*, which was ſaid to be twofold. 1. *Voluntary*, in the *Collation* of *Benefices*. 2. *Judicial*, in the hearing of Cauſes; the former might be done at *Rome*, but the other in the *Ordinary Eccleſiaſtical Courts.* And *Bracton*, who was a Judge in his time, owns the Pope as much to have *the Eccleſiaſtical Juriſdiction*, as the *King* had the *Temporal*; but yet he adds, That, *if an Eccleſiaſtical Judge did meddle with Matters out of their Cognizance, the King's Prohibition did lye againſt him, and he ought to ſuperſede his Proceedings till it were*

Coke 2 Inſt. f. 602.

Mat. Weſtm. f. 320.

Bract. l. 5. p. 5. c. 15.

were tryed in the King's Court, to whom the Juriſdiction belonged. But it is ſtill harder to prove *the King's Eccleſiaſtical Juriſdiction, becauſe the Spiritual Courts were to certifie the Kings Courts, in caſe of Bigamy, Baſtardy, and ſuch like.* For the Queſtion is not about their *Temporal Subjection* to the King in *ſignifying* the *Sentence of the Court*, but whence they derived their *Authority* of holding the *Eccleſiaſtical Courts*; over which, *Bracton* ſaith *the Pope had the ordinary Juriſdiction, & the Power to delegate others to execute it.*

What doth it ſignifie to the *Kings Eccleſiaſtical Juriſdiction, that the Barons of* England *would not receive that part of the Canon Law which concerned the Legitimation of Children born before Wedlock?* For it depended upon the *Barons Conſent*, Whether a *Canon* of the Church ſhould be made *the Law of the Land* concerning *the Rights of Inheritance.*

In the Reign of King Edward *I.*

In the Time of *Ed.* I. we may expect ſome briſker Sallies towards the Kingdoms Deliverance from the *Popes Uſurpations*, which were thought ſo intolerable even by the *Monkiſh Hiſtorians*, in his Fathers Reign.

L. *Aſſiſ.* 30. E. 3. *pl.* 19. *Brook Tit.* Pr. *pl.* 10.

What *that Bull* was, *the bringing whereof the Law-Books ſay, was then adjudged Treaſon*, it would have been worth our while to have known. For it is hard to imagine that at that time, the meer *bringing a Bull*, ſhould be *ſo Capital a Crime*, when ſo many were brought without danger both before and after. But it ſeems by the Certificate of the Judges concerning it (ſtill in the *Tower*) the Matter of it was very *prejudicial* to the *Crown.* And it argues no *Spiritual Juriſdiction* for Princes to examine and refuſe (when they ſee cauſe) *Bulls that come from* Rome. For this is practiſed in thoſe *Countries* which profeſs Obedience to the *Popes Juriſdiction.* *Covarruvias* affirms it of *Spain.* In *Portugal*, when *John* the Second would have given up that Right to the Pope, *the Eſtates of the Kingdom would not permit him.* *Peter* the Second, Duke of *Britain* forbad receiving *any Bull before Examination by his Council, under pain of Corporal Puniſhments and Confiſcation of Goods.* *Ant. Faber* ſaith, in *Savoy, No Bulls have Authority there, till they are approved by the Senate, and an Appeal lies from them tanquam ab Abuſu.* Even in *Naples* it ſelf, *Ferdinand* the *Catholick King*, gave a ſevere *Reprimand* to his *Vice-Roy*, for not hanging up a Perſon *who would have executed a Bull without his Authority.* The Letter it ſelf is Publiſhed in the *Jus Belgarum*; where many other things may be ſeen to the ſame purpoſe.

Covarruv. Peaut. Q. c. 35. *n.* 5, 6.

Jus Belgar. P. 70.

Cod. Fab. ad Tit. *Cod.* de Appel. ab Abuſ. Def. 3, 4

P. 72.

The Right of Patronage is a *Civil Right* in *Princes* as well as others; and therefore *E.* 1. Without pretending to *Eccleſiaſtical Juriſdiction*, might juſtly puniſh the *Archbiſhop of Tork* for his obſtinate refuſing to admit the Kings Clerk becauſe of a *Papal Proviſion.*

The

The *Statute of Bigamy* might very well be interpreted in *Parliament*, and yet the King have no *Eccleſiaſtical Juriſdiction*. For it was no more than declaring in what ſenſe a Law ſhould be taken, *i. e.* Whether it ſhould extend to *Bigamy* before the *Conſtitution* of the *Council* of *Lyons*, or after.

The Act of *Parliament* made at *Carliſle*, 35 *E.* 1. againſt *Aliens poſſeſſing Benefices*, is no more than hath been done in Countries where the *Popes Juriſdiction* is the moſt owned. As in *Spain*, *Covarruvias* ſaith, *They have Preſcription and Pragmatical Sanctions againſt Aliens poſſeſſing Benefices.* The Laws of *Poland*, and many *Edicts* in *France* exclude *Strangers*. *Covarr. Prat.* Q. 35. n. 5. *Stat. Polon.* p. 207, 208. Pre. *de Libertes de l'Egliſ. Gal.* vol. 2. c. 30.

But I ſhall now produce ſome conſiderable *Precedents* in the time of *Ed.* 1. to ſhew that the Proceedings againſt the *Arch-Biſhops* and *Biſhops* for *Miſdemeanors* or *Contempts*, was in *Parliament*, and not by *Commiſſioners* (the inferior Clergy being left to the Juriſdiction of their Ordinaries.)

3 *Ed.* 1. *E. Warren* complained to the King, That the *Archbiſhop of* Canterbury *had contemned his Orders in not taking off Excommunication from ſome of his Servants:* The King ſends to him to proceed no further againſt the Earl or his Servants *uſque ad Parliamentum*, where the Matter of Contempt might be debated. But in the mean time the Archbiſhop ſends to the King a true Account of the Matter, and how far he was from Contempt; which is ſtill extant in the *Records* of the *Tower*.

7 *E.* 1. *John Peckam*, Archbiſhop of *Canterbury*, was ſummoned to *Parliament*, to anſwer to *a Charge of Miſdemeanors* againſt him, for ſome Paſſages in the Council at *Reading*; which he was fain to revoke, and to declare that no Articles there paſſed, ſhould create any Prejudice to the Crown or Kingdom. *Clauſ.* 7 E. 1.

8 *E.* 1. The *Archbiſhop* went about to *Viſit the Kings Free Chappels*: The King hearing of it, ſent a Writ to him, to forbear *uſque ad proximum Parliamentum*; *ut tunc ex unamini & mutuo conſenſu provideamus quid fieri debeat in Præmiſſis.*

21 *E.* 1. *John Roman*, Archbiſhop of *York*, was Attached upon a Contempt for Excommunicating the Biſhop of *Durham*, while he was in the King's Service. And after a full hearing *in pleno Parliamento*, he was condemned, and upon Submiſſion, was Fined to the King four thouſand Marks. *Placit. Parl.* 21 E. 1. f. 135

28 *E.* 1. A Controverſie aroſe between the *King* and the Biſhop of *Chicheſter*, about his refuſing to admit a Perſon Preſented to a Prebend in the *Free Chappel of Haſtings*; the King ſends his Writ to the Warden of Cinque-Ports (extant in the Tower among the Writs of that Time) to enquire into this Matter, and to bring an Account *next Parliament*, *ad quod prædictum*

Placit. Parl. 28 E. 1. f. 227. *Epiſcopum adjornavimus*, are the Words of the *Writ*: And that the Buſineſs was heard in *Parliament*, appears by the Records.

Clauſ. 31. *E.* 1. m. 6. 31 *E* 1. The King ſeized on the *Temporalities* of the Biſhop of *Durham*, upon a Judgment given againſt him in *Parliament*, for extending his *Spiritual Juriſdiction* too far; as appears by the Record of the Concord made between the King and him.

In the Reign of King Edward *the Second.*

In the Reign of K. *E.* 2. nothing is produced but the Statute 9 *E.* 2. *for Regulating the Proceedings between the Civil and Eccleſiaſtical Courts.* But how the Kings Eccleſiaſtical Juriſdiction is proved hereby, is hard to underſtand. It appears indeed that the *Eccleſiaſtical Juriſdiction* is allowed and limited *by Parliament. But from hence*, ſaith he, *it follows that theſe Laws may be called the Kings Eccceſiaſtical Laws, or the Eccleſiaſtical Laws of* England.

There is no queſtion but they may: But there is a Difference between Laws, ſo called by *Acceptation and Allowance*; and ſuch as have their whole *Force* and *Authority* from the King. For otherwiſe, where the *Popes Juriſdiction* is owned and received, the Pope muſt receive his Authority from the King. But a Liberty to *exerciſe* Authority, and *deriving* Authority are two Things.

In the Reign of King Edward *the Third.*

In the Time of *E.* 3. many things are alledged, and to more purpoſe; but yet a ſhort Anſwer will ſerve. If the firſt Inſtance doth hold, *viz.* That *the Sentence of Excommunication by the Archbiſhop, holds againſt the Sentence of the Pope or his Legate*, it only proves that the *Eccleſiaſtical Juriſdiction* here by Law is in the Archbiſhop, and not in the Pope or his Legate. But there may be another Reaſon, mentioned by *Fitz Herbert*, viz. *That the Certificate of the Archbiſhop might be more Authentick than the Seal of a Legate.*

16 E. 3. *Tit.* E. 1. *com.* 4.

The ſecond, ſixth and eighth only prove the *King Supreme Patron*; and a *Right of Patronage* is diſtinct from a Right of *Eccleſiaſtical Juriſdiction*; and ſo it was reſolved in *Grendon*'s Caſe, *Pl. f.* 498. *That the King preſents by Lapſe, as Supreme Patron*, and not as *Supreme Ordinary*; For this belongs to him as King, the Land on which Churches are built being originally held of him: And this *Right* the King enjoyed when the Pope was owned to be *Supreme Ordinary*: But in the Caſe of his own *free Chapels Fitz-Herbert* ſaith right, *That in Caſe of Lapſe by the Dean, the King preſents as Ordinary*, the Archbiſhop and Biſhop having no Authority there as Ordinaries.

The

The third, fourth and fifth are about *Exemptions from Epiſcopal Juriſdictions granted by the King*, eſpecially in his own *free Chapels*, which are only viſitable by *Commiſſion* from the King. But this very Pretence of *Exemptions* from *Epiſcopal Juriſdiction* was founded upon the Belief of the Pope's being *Supreme Ordinary*; for exempt Places were not ſuppoſed to be free from all *Ordinary Juriſdiction*, but from that of *Inferior Ordinaries*, being immediately ſubject to the Pope. A *Biſhop*, by the *Canon Law*, may grant an *Exemption* from his *Right* of *Juriſdiction*, but not from his *Right* of *Viſitation*, but the Pope from both. And in the Grant of *Exemption* the immediate Subjection to the Roman See is expreſſed. As to the *King's free Chapels*, their *Exemption* was by an *expreſs Bull of* Innocent *III*, to King *John*; and in the Caſe of the *free Chapels of S.* Martins, *Henry* III granted a *Prohibition*, wherein it is inſerted, *That it was a free Chapel*, & ab omni Juriſdictione Epiſcopali per Sedem Apoſtolicam exempta. And 45 *Hen.* 3. in a *Prohibition* concerning the *free Chapel of* Wolverhampton, the Grant of *Innocent* III, is repeated.

Lomed. De exempt. c. 3. *n.* 7.

Chart. 16. *Joh. m.* 9. *Pat.* 22. *H.* 3. *m.* 10.

The Right to extra-parochial Tithes is *Proviſional*, and not by way of *Inheritance*, and ſo it may belong to the King, although he have no *Eccleſiaſtical Juriſdiction.*

As to the ſevere Proceeding about Bulls from Rome, I have given an Account of that already in *E.* 1.

The anointing of Kings proves no more their Capacity of *Spiritual Juriſdiction*, than it proves the *Kings* of *Iſrael* to have been *High Prieſts.*

There is no doubt *the Eccleſiaſtical Courts may be limited by the Laws of the Land*; and there are ſome Cauſes which belong to them not originally of a Spiritual Nature; but they have been a long time poſſeſſed of them by *Cuſtom*, and are allowed by Law; which is well expreſſed in 24 *Hen.* 8. *c.* 12. where it is ſaid, *That all Cauſes Teſtamentary, Cauſes of Matrimony and Divorces, Rights of Tithes, Oblations and Obventions (the Knowledge whereof, by the Goodneſs of Princes of this Realm, and by the Laws and Cuſtoms of the ſame, appertaineth to the Spiritual Juriſdiction of this Realm) ſhall be determined within the Kings Juriſdiction and Authority.*

It doth not ſeem probable, *That the King by his own Authority would remove Secular Canons, and put in Regular*; when *Hoveden* ſaith, in the ſame Caſe, *H.* 2. *did it by the Pope's Authority, and with the free Conſent of the Parties.*

Hoveden, f. 320.

The *Statutes of Proviſors* were excellent Statutes; but are ſaid to be enacted for the Good and Tranquility of the Realm, which no doubt the King and his Parliament were bound to take care of. But they prove no more *Eccleſiaſtical Juriſaiction* than the *Pragmatick Sanctions* of *Lewis* IX, and *Charles* VII, in *France* did; which were of the ſame nature.

The following Inſtances in other Reigns, are many of them of the ſame kind with thoſe already anſwered; but what ſeems to have any new Force ſhall be conſidered.

In

In the Reign of King Henry *the Fourth.*

2 *H.* 4. *c.* 15. is urged to prove, *That the King, by consent of his Parliament, did direct the Proceedings of the Spiritual Courts in Cases of Hereſie and other Matters more Spiritual*; but it is evident by the *Act* it ſelf, That the *Spiritual Juriſdiction* was left wholly to the Ordinaries, and only an *Inforcement* of it by the Civil Power was added by the Law then made, for the Words are, *Whereas the Dioceſans of the ſaid Realm, cannot by their Juriſdiction Spiritual, without Aid of the ſaid Royal Majeſty ſufficiently correct*, &c. *Therefore a Power to Impriſon and Fine was given to the Ordinaries*; who might before have proceeded by *Eccleſiaſtical Cenſures*; but theſe being contemned by them, the *Ordinaries* called in the *Aſſiſtance* of the *Civil Power*. If there had been a Power before to have proceeded againſt *Hereticks* by *Common Law*, when convict by their *Ordinaries*, I cannot ſee any Reaſon why that Law ſhould be made. *In caſe of Apoſtacy*, i. e. Renouncing Chriſtianity, *Bracton* ſaith, *The Perſon convict is to be burned*, and he inſtanceth *in the Deacon who turned Jew, in the Council of* Oxford: And *Fleta* ſpeaks only of *Apoſtates, whether Clerks or others*, and thoſe are the *Miſcreants* in *Briton*; and in *Horn*, *Hereſie* was then the ſame with *renouncing Baptiſm, or turning Jew or Turk, or uſing Sorcery*; but after *Wickliff*'s *Time* the *Ordinaries* inlarged the Notion of *Hereſie*, and took upon themſelves to be ſole Judges in it; and for all that I can ſee, the Act 2 *H.* 4. owns this to be part of their *Spiritual Juriſdiction*. And this is one Reaſon alledged for the Repeal of this Act, 25 *H.* 8. *c.* 14. becauſe there is no Declaration of *Hereſie* made in it, but it is left to the Judgment of the *Ordinary*: And therefore this Act was ill thought upon, to prove the King's *Eccleſiaſtical Juriſdiction.*

Bracton l. 3. *c.* 9. *n.* 2. *Flet. l.* 1. *c.* 29. *n.* 7. *Brit. c.* 9. *Horn. ch.* 2. *Sect.* 22.

In *Henry* the Seventh's time the King is ſaid to be *perſona mixta, becauſe he hath both Eccleſiaſtical and Temporal Juriſdiction.* But this Argument is drawn only from ſome occaſional Talk, mentioned in the Year Books, 10 *Hen.* 8. 18. *Brian* ſaid, That a ſage Doctor of Law ſaid one time to him, That Prieſts might be tried at Common Law, *Car il dit quod Rex eſt perſona mixta, car eſt perſona unita cum ſacerdotibus ſaint Eglyſe*: If all this be granted, it proves no more than that the King hath Juriſdiction by his Law over Eccleſiaſtical Perſons; which is not diſputed.

CHAP.

CHAP. III.

Whether the King's Supremacy by Law extends to the Diſpenſing with Laws: Of the Nature and Original of the Power; The Inconſiſtency of ſuch a Diſpenſing Power *with the Frame of our Government.*

HAving thus far proceeded in clearing the ancient *Legal Supremacy*, I am now come to an Inſtance of greater Weight and Difficulty; and which will therefore require more Pains and Care in the Examination of it, *viz.*

11 *H.* 7. 12. *By the Eccleſiaſtical Laws allowed with in this Realm, a Prieſt cannot have two Benefices, nor a Baſtard can be a Prieſt; but the King may by his Eccleſiaſtical Power and Juriſdiction diſpenſe with both theſe, becauſe they be* mala prohibita, *and not* mala per ſe.

Here we are to enquire into theſe things,

(1.) How far the King's *Power* and *Juriſdiction* did extend in the Caſes mentioned.

(2.) How far the Reaſon here given will juſtifie a *Power* of *Diſpenſing* with Laws.

(1.) As to the Caſes here mentioned; there is no doubt but the *Canoniſts* made the *Power* of *Diſpenſing* in theſe to be an Argument of the *Pope's Supremacy*, or the *Plenitude of his Power:* But doth it hence follow, That what Princes did to their own Subjects, as to the qualifying them for a *Legal Poſſeſſion* of *Benefices*, muſt argue a *Supremacy* in them over Eccleſiaſtical Perſons and Cauſes? And there is a difference to be made between not *Receiving* the *Pope's Canons* in particular Caſes; and a *Power* of *Diſpenſing* with *Eccleſiaſtical Laws*. If the Law were ſo then, as is *noted* by *Fineux*, in 11 *H.* 7. 12. the plain Conſequence is, That the contrary were no part of the Eccleſiaſtical Laws, allowed within this Realm. As in the famous Caſe about the Canon Law concerning Baſtardy, when the *Barons* ſaid, *Nolu-leges Angliæ mutari*; no man can ſay, That the *Barons diſpenſed* with the Pope's Eccleſiaſtical Laws; but that they refuſed to execute them; for, as it is well obſerved in *Standiſh*'s *Caſe*, in *Kelway*'s *Reports*, 7 *H.* 8. *Eccleſiaſtical Laws have no force, where the General Practice hath been contrary.* If this were no more than a private Opinion of *Fineux*, of what he thought the King might do, although there were no Precedent for it,

then it ſignifies little; but if from hence it appears, What the *Common Law* of *England* was; then it follows, That this was not received at that time for the *Eccleſiaſtical Law* of this Kingdom. And ſo *Hobart*, in *Colt* and *Glover*'s Caſe underſtands it, *f.* 147. for he produces this as an Inſtance, *That the Crown always kept a Poſſeſſion of its Natural Power*: And to this he adds *a Power of Commendam or Retaining a Benefice with a Biſhoprick*, 11 H. 4. 60. This he calls *a Power of Diſpenſation in Spiritualibus*: But with ſubmiſſion to two ſuch great Men in the Law, *if the Crown always kept a Poſſeſſion of theſe Rights*, there could be no *Diſpenſation* with the *Eccleſiaſtical Law* in theſe *Matters*, but an *Excluſion* of it.

As for Inſtance, The *Kings* of *France* do challenge many *Priviledges* to themſelves in their Kingdoms, in plain *Derogation* to the *Canon Law*; and for theſe *Priviledges* they plead an *Ancient Right* of the *Crown*, or an *immemorial Cuſtom*: As in the great Controverſie of late Years, about the *Regale*, the Canon Law is expreſs, *That upon Pain of Excommunication, no Lay Perſon whatſoever ſhall preſume to meddle with the Profits of Vacant Biſhopricks*; which was decreed by two Popes in ſeveral Councils, *Urban* II, in a Council at *Awergn*, M XC V, and *Innocent* II, in a *Lateran Council* M C XXX IX; both entred in the Body of the Canon Law: And yet the *Kings* of *France* inſiſt to this Day on the *Rights* of *Vacant Sees*, as belonging to them. But can this be pleaded as a *Diſpenſing* with the *Eccleſiaſtical Laws* allowed in that *Realm*? No, but that this Part of the *Eccleſiaſtical Law* was not received there; for that, partly by the *Feudal Right*, partly by the *Right of the Crown*, partly by *Immemorial Cuſtom*, the Profits of Vacant Biſhopricks accrue to the King.

C. 12. *q.* 2. *n.* 46, 47.

It is a harder Point to defend the *Regale*, where the Cuſtom hath gone along with the Canon; but if the Rights of the Crown be defended in *France* againſt *Cuſtom* and *Canon* too, our Kings cannot be blamed for reſuming other *Rights* after ſo long Uſurpation by the Popes. But where the *Canon Law* was not received in any Part of it, there it hath no Force to oblige; and where there is no Eccleſiaſtical Law in Force, there can be no *Diſpenſing* with it; for although the later Canon Law, doth void all *Cuſtoms* againſt the *Liberties* and *Priviledges* of the Church, *Non debet in hac parte Canonibus, ex aliqua conſuetudine præjudicium generari*: Yet when theſe Canoniſts come to explain it, they tell us, *That an immemorial Cuſtom hath Force againſt a Canon*; but how? Not *as a Cuſtom, but as it is a Proof of an Ancient Priviledge granted by the Pope*; although there be not the leaſt Footſteps of it: And ſo this Inſtance of *H.* 7. will prove, according to this Way, only ſome Ancient Priviledge our Kings had, and no *Eccleſiaſtical Juriſdiction* by the Right of the Crown.

C. Clerici de Judiciis.
C. cum terra de elect.
C. 1 *&* ult. *de Conſuet.*

But whether the King could *Diſpenſe* with the *Eccleſiaſtical Laws* in theſe Caſes, or not, it is certain the Pope challenged to himſelf the *Power* of doing it.

For,

For, after that the Third Council of *Lateran* had ſtrictly forbidden Pluralities (which were then ſo common and ſcandalous) upon pain of Forfeiture, *Innocent* the Third complained in the Fourth *Lateran*, That *he ſaw little or no Benefit come by that ſevere Canon*; and therefore he ſeems to make one more ſevere: That *whoſoever takes another Benefice, ſhall be deprived of the former ipſo jure; and if he ſeeks to keep it, to loſe the other.* Yet after all, this ends only in the *Popes Power to diſpenſe as he ſaw Cauſe, with Perſons of greater Rank or Merit, and greater Preferments.*

The Words are, *Circa ſublimes tamen & literatas Perſonas, quæ majoribus Beneficiis ſunt honorandæ, cum ratio poſtulaverit, per Sedem Apoſtolicam poterit Diſpenſari.* Here the Diſpenſing Power is fairly owned in the Canon it ſelf. *De Multa de Prabend.*

And in the other Caſe, of the *Incapacity of Prieſthood by Illegitimation*; the ſame ſtout Pope declares, That it was in his *Power* to diſpenſe with that too.

The Caſe was this; The Church of *Worceſter*, upon the Vacancy of the See, had choſen the Arch-Deacon of *York* for their Biſhop; he comes to the Arch-Biſhop of *Canterbury* for Confirmation; but ſecretly confeſſes to him his *Illegitimacy*; (which came to the Popes Ear.) Upon Application to the Pope for his Confirmation, he demurs upon it. He could not deny that he had all other Qualifications: But there was a Canon of the former *Lateran Council*, which voided the Election of all *Perſons Illegitimate.* So then the Buſineſs is at an end. Not ſo neither. *His Predeceſſor could not hinder him from Diſpenſing in this Caſe; who had equal Power with himſelf. And there were many Reaſons to induce him to grant him a Diſpenſation.* Why then did he not give one? There was ſomething elſe to be done firſt. The *Diſpenſing Power* muſt be owned by the Church of *Worceſter*: And therefore they muſt firſt intreat the Pope to *Diſpenſe* with him, by a humble Supplication; and then expect his Favour by *Poſtulation.* And ſo, for the preſent he voids his Election. C. *Innotuit de* Elect.

Matt. Paris takes particular Notice, That in the Publication of the *Decretals* by *Gregory* 9. *This Power of Diſpenſing in theſe two Caſes*, was looked on as a *great Innovation*; but ſuch as brought great Advantages to the *Court* of *Rome.* *Mat. Paris, ad* A. D. 1235.

And the ſame *Pope*, ſaith *Matt. Weſtminſter*, voided the Election of *John Bloud* to the See of *Canterbury*, *becauſe he had enjoyed two Benefices with Cure of Souls, without a Diſpenſation.* And *Stephanus de Segrave* obtained, he ſaith, *of that Popes Nuncio here, a Diſpenſation of* Tot quot; *but it came to nothing by his Sons Death.* *Matt. Weſtm. ad* A.D. 1233.

Here we ſee a Power of *Diſpenſing* with *Eccleſiaſtical Laws*, publickly owned and entred in the Body of the Canon-Law; and that by virtue of *the Plenitude of the Popes Power*, which could not be bounded by the Canons of the Church, nor by the Laws of his Predeceſſors; nor by the ſolemn Profeſſion every Pope makes at his Entrance, to preſerve inviolably the Canons and Conſtitutions of his Predeceſſors. This

This made ſo great an Alteration in the ſtate of the Church, that it is no wonder great Complaints were made of it; conſidering that the Conſequence of ſuch a Power, could be nothing leſs than a ſubverſion of all Orders, and Canons, and Privileges; for there could be no ſecurity of any of them any longer than it conſiſted with the Popes Pleaſure.

Matt. Paris, A. D. 2246. p. 649. A. D. 1251. p. 818.

Hence came all the Complaints of *Non-obſtante's*, by the *whole Engliſh Nation in Parliament*, *That by their means Oaths, Cuſtoms, Charters, Grants, Privileges ſignified nothing*; for the Pope could *Diſpenſe* with his own *Oaths* and *Promiſes*, as well as other mens; and ſo there could be no Truſt in any thing he ſaid or promiſed in never ſo ſolemn a manner. Which is an effectual courſe to overthrow any Government in the world. And it is a wonder, that after ſuch groſs and avowed violations of the moſt ſolemn Engagements, Mankind did not renounce all kind of Society with him: For that is founded upon Truſt in Compacts and Promiſes; and if thoſe may be diſſolved at pleaſure, there is no foundation of mutual Society left; there being no reaſon to expect the Performance of that from others, which they do not think themſelves obliged to do. And ſo ſuch a *Power* of *Diſpenſing* with *Obligations*, naturally tends to a Diſſolution of Government. For it is ſinking the main Pillars on which the whole Fabrick ſtands; which will tumble down ſooner or later upon the heads of thoſe who do it.

Matt. Paris, A. D. 1253. p. 873. *Lib. Diurnus Pontif.* 30.

But the great Argument then was, That *Supreme Power cannot be bound*; and therefore the *Popes* pleaded, whatſoever *Canons* or *Laws* their Predeceſſors made, they could not tie up them; becauſe *Par in Parem non habet imperium:* So we find *Innocent* 3. argued in the *Canon-Law*. And to the ſame purpoſe *Matt. Paris* ſaith, That his Succeſſor *Innocent* 4. did. But they did not attend to their own *Profeſſions*, ſtill extant in the *Liber Diurnus*, wherein they did declare in the moſt ſolemn manner, That *they would maintain the Canons and Conſtitutions of their Predeceſſors*. Which was an abſolute Bar to all *Non-obſtante's*, if they acted upon Principles of common Honeſty among Men.

But beſides this, in *Privileges granted to others* upon valuable Conſiderations (which the Popes took care of) the Perſons to whom they are granted, become *Parties*, and have a real *Intereſt* in them; ſo that they become of the *Nature* of *Contracts*; which cannot be broken without plain Injuſtice, and diſſolving that Obligation between them.

Ferrand. Vaſq. Cont. Fret. l. 3. c. 51. n. 2. *Pet. de Marca, de Concord. Sacerd. & Imperii*, l. 3. c. 10. n. 2.

It is agreed by the moſt Learned and Judicious Lawyers, That *when Grants or Promiſes do paſs into the Nature of Contracts, they are irrevocable by the Parties that made them.* And this the beſt French *Canoniſts* do plead againſt the Popes Power of revoking the *Gallican Liberties*, ſuppoſing them at firſt to have come from the Popes *Condeſcenſions* to them. And the ſame Reaſon will hold as to other *Liberties*.

But

But here lies the main Difficulty, to ſhew, When *the Grants that are made by Superiors, do paſs into the Nature of Contracts*; ſo that they cannot be *Revoked* or *Diſpenſed with.*

The ſhort of it is, When they are rather *Capitulations* than *Laws.* For *Laws* are properly the Commands of thoſe who have Authority to oblige; and the Reaſon of the *Obligation* is drawn from the *Authority* of the Perſons: But *Capitulations* proceed upon *Conſent* of *Parties* having differing *Intereſts*; and theſe among Private Perſons, are called *Contracts*; and no one queſtions, but that ſuch all men are by natural Juſtice bound to perform.

But the Popes inſiſted on *the Plenitude of their Power*; and a Queſtion is put among the *Canoniſts*, and variouſly debated: Whether *if the Pope ſwear to ſome things in the Conclave, as that he will hold a General Council within ſuch a Time, he can Diſpenſe with himſelf, or not?*

Some ſay, he is guilty of Perjury, and cannot abſolve himſelf, although he ſhould apprehend that a greater Good would come by not keeping it. For that both *Pope and Emperor are bound by their own Contracts*; the keeping of them being a Part of *Natural Juſtice*: which no *Plenitude of Power can Diſpenſe with*; ſince all *Contracts* give a *Right* to the Perſons with whom they are made; inſomuch that *Baldus* his Authority is cited by them for theſe Words, *Contractus qui fiunt cum Principe, habent naturam bonæ Fidei contra Dominum*; and he goes ſo far as to ſay, That *the Sovereign Power is ſo obliged by the Contracts made by Princes with their own Subjects, that they are not revocable by themſelves or their Succeſſors: And if they were not obliged by their own Contracts, no man could truſt them; and conſequently all Society with them, would be diſſolved.* And whatever *Supreme Power* may do as to ſuch Acts as are properly its own, yet where there is *Jus quæſitum alteri* (as in all *Contracts* there is) that cannot be taken away by it.

Baldus, in c. 2. §. *Siquis vero de Pace Conſt. In l. Digna vox. In* l. 1. *F. De Conſt. Princip.*

Faſobat. De Conciliis. l. 7. f. 320. C.

But all this was anſwered on the other ſide, by the *Plenitude of the Popes Power*; for it was a *Contradiction*, they ſaid, to own that, and to ſay, That *there was any Engagement by Oath, or otherwiſe, which he could not Diſpenſe with.* For, as *Hank.* 11 *H.* 4. 37. ſays, *Papa omnia poteſt.* And therefore all ſuch *Oaths* and *Promiſes* as limit the *Popes Diſpenſing Power*, are void in themſelves. And as to *Eccleſiaſtical Laws* or *Conſtitutions*, they eaſily reſolved all Difficulties about them, upon ſuch Principles as theſe.

Hob. R. f. 146.

1. That *the Popes have the ſupreme Power in the Church.*
2. That *the Eccleſiaſtical Laws were the Popes Laws.*
3. That *it is an inſeparable Prerogative in the Pope to Diſpenſe with Eccleſiaſtical Laws upon Neceſſity and urgent Occaſions.*
4. That *the Pope is the ſole Judge of that Neceſſity.*
5. That *this was not a Truſt given to the Pope by Councils or Conclaves, but by God and St.* Peter, *and therefore cannot be taken away from her.*

But I ſhall endeavour to give a clearer Light into this Matter, by ſhewing the ſeveral Steps and Degrees how this *Diſpenſing Power* came into the World, and how it paſſed from the Eccleſiaſtical to other Laws, when Princes aſſumed ſuch a *Plenitude of Power* in *Civils*, which the *Popes* practiſed in *Eccleſiaſticals*.

C. 1. q. 7. ſect. niſi rigor.

The firſt time we read of *Diſpenſations* was with reſpect to the Ancient Canons of the Church; and it implied a *Relaxation of the Rigour of them*; not with reſpect to their *Force* or *binding Power*, but as to the *Penance* which Perſons were to undergo for the Violation of them. And herein the Notion of *Diſpenſing* was very different from what the *Canoniſts* made it afterwards, when they declared it to be *a Relaxation of the Law it ſelf*; ſo that it ſhould not have that Force upon the Conſcience which it otherwiſe had: For, a Diſpenſation with them, is *a Licence to do that which they cannot lawfully do without it*; and that with a *non-obſtante* to that which otherwiſe makes it Unlawful. *De Jure illicitum fit ex Diſpenſatione licitum, & hic eſt proprie effectus Diſpenſationis*, ſaith *Pyrrhus Corradus*; who gives a large Account of the Practice of *Diſpenſations* in the *Court* of *Rome*, which conclude with a *non-obſtante* to any former *Conſtitutions* or *Canons* of *Councils*: But no ſuch thing can be found in the Ancient Practice of the Church, becauſe the Popes themſelves were then believed to be under the Canons. But when it was ſuppoſed, That the ſevere Execution of the Canons would rather hinder than advance the Good of the Church, the Governours of it thought they had ſufficient Authority to abate the Rigorous Execution of them: As about the *Times* of *Penance*, the *Tranſlation* of *Biſhops* from one See to another, the *Intervals* of *Orders*, and ſuch like. But the Popes then pretended to be ſtrict Obſervers of the Canons, when the particular Biſhops took upon them to *Diſpenſe* with the *Execution* of them; as appears by *Ivo*'s Preface to his *Collection* of *Canons*, where he diſtinguiſheth the *Immoveable* or *Moral Precepts* from the *Canonical*; which he calls, *Moveable*. In the former, ſaith he, *no Diſpenſation* is to be allowed; *But in thoſe things which only concern Diſcipline, the Biſhops may Diſpenſe, provided there be a Compenſation*, i. e. That the Church's Intereſt may be better ſecured or advanced thereby, as he there diſcourſes at large; And his Rule is, *Ibi Diſpenſatio admittenda eſt, ubi rigor periculoſus eſt*: But by this means the Severity of the Primitive Diſcipline was quite loſt.

Praxis Diſpenſ. Apoſtolicarum Auctore Pyrrho Corrado.

C. 7. q. 1. c. Petiiſti.

Ivo Epiſt. 236

The Biſhops of *Rome* obſerving this, thought it a proper time for them to appear zealous for the *Ancient Canons*, which gained them a great Reputation in the World; and by this means *the Cuſtody of the Canons* was looked on as their particular Province: Which they improved ſo well, that at laſt they turned the *Guardianſhip* of the *Canons* into *a Power over them*; and then they found Fault with the Biſhops *Diſpenſing* with them, for another Reaſon, *viz.* Becauſe the *Diſpenſing Power* was a

Pre-

Prerogative of the *Roman See*, and Inferior Biſhops could act no farther in it than they had Authority from it.

We find that in S. *Bernard*'s time, the *Pope* did take upon him to *Diſpenſe* too far, to his great Diſſatisfaction; for *by his Diſpenſing Power*, he ſaith, *he overthrew the Order of the Church*; Murmur loquor, *ſaith he*, & querimoniam Eccleſiarum. The Pope diſpenſed with the *Eccleſiaſtical Laws*, in *Exemptions of Abbots and others from that Subordination*, they ſtood in to their proper Superiors: He ſaith, *He could not ſee how this Diſpenſing Power could be juſtified: You do indeed ſhew a plenitude of Power, but it may be not of Juſtice; you ſhew what you can do, but it is a Queſtion whether you ought or not; and you ought to conſider, Firſt, Whether it be lawful; then whether it be decent; and laſtly, whether it be expedient.* At laſt, he allows a *Diſpenſing Power* in two Caſes, *Urgent Neceſſity, and Common Good*; otherwiſe he ſaith, It is not *fidelis Diſpenſatio, ſed crudelis Diſſipatio*, an overthrow of all Order and Government. In one of his Epiſtles he ſpeaks ſharply againſt getting a Diſpenſation to do that which it was not lawful to do without one: And he thinks he hath diſproved it by invincible Reaſon, For a Licence from the Pope can never make that Lawful, which without it were Unlawful.

Bernard de conſider. ad Eugenium, l. 3.

Bernard. epiſt. 7.

When the Practice of the *Diſpenſing Power* grew more common, there were two great Queſtions raiſed concerning it; Whether if a *Diſpenſation* were granted without *Juſt Cauſe*, it were *Lawful* or not? And, Whether if it were not *Lawful*, yet it was *valid?* There were ſome who flattered the *Diſpenſing Power* ſo much, that they allowed it in all Caſes, whether there were a juſt Cauſe or not: Theſe were the high-flown *Canoniſts*, who reſolved all *Laws* into *Will and Pleaſure:* But others, who allowed a *Diſpenſing Power* upon a *Juſt Cauſe*, yet thought it repugnant to the Original Deſign of Government, for thoſe who are entruſted with Care of the Laws, to Diſpenſe with them, without ſuch a Cauſe as anſwers the End of Government: And ſome went ſo far, as to deny any Validity in a *Diſpenſation* granted upon *Pleaſure*; for as an unjuſt Law hath no Force, ſo, ſaid they, an unjuſt Diſpenſation of a Good Law hath none.

Upon this Point two great Schoolmen differ. *Suarez*, whom the Lord Chief Juſtice *Vaughan* commends for his Learning in this Matter, goes upon theſe Grounds,

Suarez de legibus, l. 6. c. 18, 19. Vaughans Rep. *f.* 348.

1. That a Prince is not *Dominus, ſed Diſpenſator Legum*; although the Force of a Law depends upon his Authority; and therefore in Diſpenſing with a Law he doth not act by *Abſolute Power*, but by *Adminiſtration:* For he is not *Lord over the Community, but Governour.*

Suar. c. 18. n. 6.

2. That for him to *Diſpenſe* in a Law made for the *Community*, without a *juſt Cauſe*, is not only *malum quia prohibitum, ſed ex ſe, & ex natura rei & ſemper malum:* Therefore *Suarez* was far from thinking a Prince might Diſpenſe with any thing that

n. 26.

was

was not *malum in ſe*; for he makes it to be ſo, for him to diſpenſe with a *malum quia prohibitum*, if it be prohibited by a Law made for a Publick Good, and there be no juſt Cauſe for it.

3. That although a Prince ſins in *Diſpenſing* with ſuch a Law; yet his *Diſpenſation* holds as to the *Force* of the *Law*; which he ſuppoſes to depend *on the Will of the Prince*, and therefore his Will being altered, the Obligation ceaſeth as to the Perſons Diſpenſed with.

c. 19. *n.* 6.

4. That although ſuch a *Diſpenſation* holds as to the Law, yet he thinks a Prince bound in Conſcience to *Revoke* ſuch a *Diſpenſation*, becauſe it is unlawful for him to perſiſt in ſuch a Will, it being repugnant to the *Common Good*, and the *Obligation* of his *Duty*.

n. 9.

5. That if ſuch a *Diſpenſation* be to the Injury of a third Perſon, then it is void in it ſelf, as being repugnant to *Juſtice*.

n. 10.

Vaſquez ſaith, *They are all agreed, That no Prince hath a Power to Diſpenſe with his Laws according to his Pleaſure*; or *becauſe they are his Laws*: But he ſaith, *There is a Diſpute, Whether an unlawful Diſpenſation be valid or not? And he thinks not, and that a Man's Action after the Diſpenſation, is as faulty as if there had been none*; His Reaſon is, *becauſe a Prince is bound by his own Laws, ſo that he cannot Diſpenſe with himſelf as to the Obligation of them*; *for, if he could at Pleaſure Diſpenſe with himſelf, he could never be bound*; *for how can a Man be bound to keep a Law, in which he can Diſpenſe with himſelf when he pleaſes? And if he cannot Diſpenſe with himſelf, much leſs with any under him.*

Vaſq. 1. 2. *Diſp.* 178. *c.* 4. *n.* 34.

Having thus endeavoured to clear the *Nature* and *Original* of the *Diſpenſing Power*; I now come

(2.) To the *Reaſon* aſſigned by Sir *E. Coke*, from the *Year Books*, why the King may Diſpenſe with Laws, becauſe they be *mala prohibita* and not *mala per ſe*.

My Lord *Vaughan* ſaid Right concerning it, *That this Rule hath more confounded Men's Judgments on this Subject than rectified them:*

Vaugh. Rep. *f.* 332.

Which I ſhall make appear by ſhewing,

I. That it alters the Frame of our Government.

II. That it takes away all Security by Law.

III. That it contradicts the Senſe of our Nation in former Ages.

IV. That the Rule is contrary to the Precedents in *Law*.

I. That it alters the Frame of our Government.

For it goes upon a very falſe Ground, *viz. That the King may Diſpenſe with any thing which is not Evil in its own Nature,*

ture, or antecedently to any Human Laws; which is to ſuppoſe the whole *Legiſlative Power* to be lodged in the Perſon of the King:

For, all who underſtand theſe Matters, do agree, That a *Power* to *Diſpenſe* with *Laws*, is the ſame with a *Power* to *make* them.

Diſpenſare, hoc eſt, lege ſolvere is ſolus poteſt, qui ferendæ abrogandæq; legis poteſtatem habet; ſaith *H. Grotius*. *Grot. de æquit. Indulg. & facilitate, c. 2. n. 10*

Suarez ſaith, He hath the Power of *Diſpenſing*, *qui legem tulit, quia ab ejus voluntate & potentia pendet*. *Suarez de leg. l. 6. c. 14. n. 2.*

Vaſquez, That the Diſpenſing Power lies in him, *qui habet Poteſtatem condendi & abrogandi legem*. *Vaſquez 1, 2. diſp. 178. c. 2.*

Puſendorf, *That none can Diſpenſe with a Law, but ſuch as have the Power of making it.* *Puſendorf de jure naturæ, & gent. l. 1. c. 6. n. 17.*

But we need no Authorities in this Matter: For to *Diſpenſe* (in the Senſe it is here taken) *is to take away the Obligation of a Law*; and whoever takes it away muſt have the Power of laying it on: And there is no Difference between the *Diſpenſation* with a Law, and the *Abrogation* of it; but that a *Diſpenſation* is an *Abrogation* of it to particular Perſons, while others are under the Force of it; and an *Abrogation* is a *General Diſpenſation*, that being no more than a *Relaxation* of the whole Law, to thoſe Perſons who were bound by it before: But if a part of the Law be taken away, as to the whole Community, then it is called a *Derogation* of it; But if the Law be *Relaxed* only for a limited Time and under certain Conditions, then it is not an *Abrogation*, but an *Indulgence* or *Suſpenſion* of the Law.

To *Diſpenſe with a Law* is more than to give an *Equitable Senſe* or a Favourable Interpretation of a Law; for he that *Inteprets* a Law, ſuppoſes his Interpretation to agree with the Senſe and Deſign of the Law; he that *Diſpenſes*, owns that which he diſpenſes with, to be againſt the Intention of the Law, but that he hath *Power* to take away the *Force* of it, ſo far as he thinks fit.

He that ſaith, *Thou ſhalt not kill*, doth not reach to Legal Executioners of Juſtice, *interprets* the Law according to *Reaſon* and *Equity*: But when *God* ſaid to *Abraham*, *Go and Sacrifice thy Son*, he muſt be ſuppoſed, by virtue of his *Supreme Authority*, to *Diſpenſe* with the Law in his Caſe, ſo as to make that Lawful upon his Command, which would not have been ſo without it.

Some will not allow this to be called a *Diſpenſation*, but an *alteration of the Matter of the Law*; but when that Alteration comes from the *Authority* of the *Law Makers*, it is the ſame; ſo that to *Interpret* a *Law* is an Act of *Diſcretion* and *Judgment*; but to *Diſpenſe* with it, of *Authority* and *Juriſdiction*. And none can therefore *Diſpenſe* in the *Law of God*, but he that made it; all that the Wiſeſt and greateſt Men can juſtly pretend to, is no more than to give the true Senſe of it; and it is intolerable Preſumption for any Creature to pretend to more.

An *Equitable Senſe*, as to Human Law, is not always that which ſeems to be moſt favourable to thoſe who go againſt the Letter of it; but that which moſt enforces the End and Deſign of the Law, although it be not comprehended in the Words of it.

If a Law mentions a Crime of a leſſer nature, in regard of Circumſtances, and in regard of thoſe Circumſtances, promiſes ſome Favour, (as Benefit of the Clergy) it can be no *Equitable Senſe* to extend it to ſuch Acts which have worſe Circumſtances, becauſe the Ground of the Favour was the extenuation of the Fact by the Circumſtances; ſo that the chief Rule of *Equity* in the Interpretation of a Law, is to attend to the *Intention* and *Deſign* of it, more than to the bare Words.

The *Intention* and *Deſign* of the Law is not to be meaſured by Particular and Accidental Caſes, wherein ſome Inconveniencies are to be born, but by the *Publick* and *General Good*, which more than makes amends for them; which is the Reaſon of that Maxim, *Better a Miſchief than an Inconvenience*; which is falſe, unleſs taken in ſuch an *Equitable Senſe*.

There are certain Ways of Reaſon, which Mankind do allow in the *Equitable Interpretation* of Laws, as *That no poſitive Law muſt be interpreted againſt Natural and Divine Laws:* That *if Laws contradict each other, one or the other muſt loſe its Force:* That *no Caſe which overthrows a Law by neceſſary Conſequence, was ever intended to be allowed by it*; For that were to make a Law, and to give a Liberty to break it at the ſame Time.

If a Law be deſigned for a *Publick Good*, and an Exception be afterwards made againſt it, as to the *Incapacity of ſome Perſons, by it, for Publick Service*, which could not but be foreſeen and conſidered at the Time of making the Law, there is no Reaſon that ſhould be alledged as a Reaſon for *Diſpenſing* with the Law, which was intended at firſt by the Law: For however the Caſe may be put, as to ſuch things which could not be foreſeen, at the making of a Law, yet what was intended to be prevented by the making it, cannot in Reaſon be alledged againſt it: Becauſe if there had not been other things to have over-ballanced that Inconvenience the Law had never been paſſed.

There is no doubt but the ſame Power which makes a Law, may *Diſpenſe* with it, if it ſees Cauſe; for if it can *Abrogate* a Law, as to the *whole Community*, it may as well *Diſpenſe* with it, as to particular Perſons, and leave it in Force to all others.

The Queſtion then is, Whether a Prince aſſuming to himſelf a *Diſpenſing Power*, doth not thereby aſſume the *Legiſlative* too? Since it appears, That there can be no *Power* to take off the *Obligation* of a Law, but that which cauſes it; although it be with reſpect to particular Perſons; but if it amount to a *General Suſpenſion* of a Law, there can be no Queſtion to thoſe who underſtand what theſe things mean.

Our preſent Buſineſs was to ſhew, That if the King can *diſpenſe* with *Mala prohibita*, as ſuch, the *Legiſlative Power* muſt be

be reſolved into him; becauſe a *Diſpenſing Power* can be refer'd to no other: And if the King may Diſpenſe with all *Mala prohibita*, he may Diſpenſe with all juſt human Laws. For no Law can be juſt, which requires *Malum in ſe*; and therefore ſuch a Law being void of it ſelf, there can be no Exerciſe of a Diſpenſing Power, but concerning *Mala prohibita*. And if the King can therefore Diſpenſe, becauſe they are *only prohibited*, then from a Parity of Reaſon he may *Diſpenſe* with *all Laws* that concern only ſuch things; and we cannot be ſecure of any Laws, but ſuch as forbid things that are *evil in themſelves*.

II. And this is my Second Reaſon againſt it, That it takes away all *Security* by our *Laws*, both as to our *Religion* and *Liberties*.

1. As to our *Religion*: I grant, that, to take away *all Religion*, is *Malum in ſe*; to take away the *true Religion*, is *Malum in ſe*; but in a Nation divided about the *true Religion*, and where the Prince is of one Opinion, and the main Body of the Nation of another concerning it, what *Security* can the People by this *Rule* have as to the enjoying that which they account the *true Religion*, but the Prince doth not? The utmoſt we can ſuppoſe in this Caſe, is, for ſuch Laws to be made, as they apprehend to be moſt effectual for this Purpoſe. But what *Security* can theſe Laws afford, if the Prince aſſume a Power of *Diſpenſing* with *Eccleſiaſtical Laws*? It is not poſſible they can have any, unleſs they can be ſecure he ſhall never exerciſe this *Diſpenſing Power*; for by it, he may equally ſuſpend all Laws which relate to it; he may give a *Diſpenſation* to ſuch as are unqualified by our Laws, and put them not only into Places of Authority and Truſt, but into all Eccleſiaſtical Preferments, as ſoon as he thinks fit; and that without any Check upon his Conſcience; becauſe thoſe whoſe Office it is to interpret the Laws, tell him, he hath ſuch a Power by Law to *Diſpenſe with Eccleſiaſtical Laws*, although paſſed in the ſolemneſt manner, and with a Deſign to give *Security* to the People concerning the preſerving their Religion.

And the higher this Point is carried, ſtill the leſs *Security* For, if it be thought ſuch a *Prerogative of the Crown, as voids all that is made againſt it*, then Laws ſignifie juſt nothing: For, every Law is a Limitation of unbounded Will and Power; and therefore Laws afford no manner of *Security*; for either they are void of themſelves, or may be made void when a Sovereign Prince pleaſes. And I think (as Men are) meer *Will and Pleaſure* will never be taken for an infallible *Security*.

But it may be ſaid, That *taking away the true Religion*, is *Malum in ſe; and therefore by this Rule ſuch Laws cannot be diſpenſed with.*

Very true; we think ſo: But ſuppoſe a King of another Opinion; and that he ſhould think it good Service to deſtroy

Hereſie

Hereſie and Schiſm, and thoſe are *Mala in ſe* ; what *Security* can there be then from this Rule ? For the ſame Perſons who aſſert the *Diſpenſing Power*, make the *King* to be *Judge*, not meerly of the *Neceſſity* and *urgent Occaſions*, but of what is *Malum in ſe*, and what not ? Suppoſe then, he ſhould look on our Religion as *Hereſie and Schiſm*, what poſſible *Security* can this Diſtinction afford us ?

2. As to our *Civil Liberties* ; Which are founded upon our Laws, made by the *Conſent of King and People*. But if there be ſuch an *inſeparable Prerogative* in the *Crown*, as enables the King to *Diſpenſe* with all *Mala prohibita*, what becomes of all the *Ancient Charters of Liberties* ? For, no one can pretend that the contrary to them all are *Mala in ſe*. And if there be no farther *Security*, than what this Diſtinction affords, we are in a very precarious Condition, as to all our *Liberties*.

I confeſs the Caſe is different, as to the *Eccleſiaſtical Laws*, mentioned in 11 *H.* 7. 12. and as to our *Civil Liberties* ; becauſe theſe *Eccleſiaſtical Laws* had their Force as ſuch from a *foreign Power* ; and as far as they were the Laws of the Kingdom, it was by a *Tacit Conſent* and *Acceptation* ; and not by any ſolemn Enacting of them. And as to ſuch as theſe, where the Laws were not received, and the things were no farther evil, than as they were prohibited by ſuch a Foregin Power, there is nothing but what is reaſonable in the Caſe of 11 *H.* 7. 12. as it is in the Books.

But when this hath been extended to *Laws* which have paſſed in the moſt ſolemn manner by the *King in Parliament* ; it is time not only to take notice of, but to ſet forth the *miſchievous Conſequences* of this Diſtinction, as it is ſo applied ; for it leaves us under no manner of *Security* by our *Laws*.

3. It contradicts the Senſe of our own Nation in former Ages. Which I ſhall ſhew in a remarkable Inſtance, about the *Statutes* of *Proviſors*, 35 *E.* 1. 25 *E.* 3. 13 *R.* 2. which were *Prohibitory Statutes*. And it cannot be ſuppoſed that at that time, when the Pope was allowed to be *Head of the Church*, and conſequently *Supreme Patron* of the *Benefices* of it, that the Acceptance of a Title to an *Eccleſiaſtical Benefice* from him, ſhould be thought *Malum in ſe*. But theſe *Statutes* being in force, I ſhall make it appear that the King did own he had no Power to *Diſpenſe* with them, but as the *Parliament* thought fit to allow it.

I begin with 15 *R.* 2 at a time, *when the Kingdom was in quiet* ; and however, could not be in any diſturbance on the Account of the *Statute* of *Proviſors*, which the Nation deſired, and only thoſe who depended on the Court of *Rome* oppoſed. But the *Court-Biſhops* ſuggeſted that it was for the Kings Intereſt in dealing with the Court of *Rome*, to have a Power to *Relax* and to *Diſpenſe* with theſe *Statutes* as he ſaw Cauſe. Therefore the Arch-

Arch-Biſhop of *York*, then Chancellor, propoſed it in the opening of the Parliament, as one of the things for which it was called, *viz. To find out a Temperament in that Matter, ſo as the Pope might not loſe his Right, nor the King his.* After this Matter was debated, the Commons declare their Aſſent *en plein Parliament*, That *without prejudice to the Rights of thoſe who were in Poſſeſſion by virtue of the Statute, the King by the Advice and Conſent of the Lords, might Diſpenſe with the ſaid Statute, ſo as ſhould ſeem reaſonable and uſeful till the next Parliament, but ſo as the ſaid Statute be repealed in no Article of it.* And they reſerve to themſelves *the Liberty of diſagreeing the next Parliament.* And they conclude with a ſolemn Proteſtation, That *this was a Novelty not practiſed before, and ought not to be drawn into an Example and Precedent for the future; and they deſire this Proteſtation might be Entred and Recorded in the Rolls of Parliament; which the King commanded to be done.* Doth this now look like a *Declaratory Act*, and *made in Affirmance of the Kings Diſpenſing Power?* It might as well be ſaid, That an Act for *Reſtraining* the *Prerogative*, is made in *Affirmance* of it. It is true, there is a *Diſpenſing Power* granted, but with ſuch Reſtrictions and Limitations as ſhew, that ſuch a Power was not then thought to be inherent in the Crown. For,

Rot. Parl. 15 R. 2. n. 1.

n. 8.

1. Why ſhould it be propoſed to the *Parliament* to grant it, if the King had it before? Did the *King* ever put it to the *Parliament* to grant him a *Power* to *Pardon Malefactors?* But in the caſe of *Diſpenſing* with a *Law*, it was not only propoſed but aſſigned, as one Reaſon of calling the Parliament.

2. Why *till the next Parliament*, if it were owned to be an *inherent Right of the Crown*? Would the Parliament go about to bound and limit an *inſeparable Prerogative* in ſuch a manner?

3. Why is it called *a Novelty, and a thing not to be drawn into example?* Was ever any thing like this ſaid of a *Declaratory Act?* The Natural Conſequence whereof is juſt contrary; that whereas ſome juſt Right of the Crown hath been conteſted and denied, for the future it ought to be owned and ſubmitted to by all Perſons. It is hard to think of Words more inconſiſtent with a meer *Declaratory Act* than thoſe, *Ne ſoit trait en enſample nen Conſequence en temps avenir.*

4. If this were *a Declaratory Act*, what need it be repeated ſo often in Parliament afterwards? Were the Commons ſo forgetful of the Kings Prerogative, as to need making ſo many *Declaratory Acts* about the ſame thing? Yet thus we find it about this *Diſpenſing Power*, as to the Statutes of *Proviſors.*

For 16 *R.* 2. The *Archbiſhop of York* again declared in the opening of the Parliament, That *one Cauſe of calling it, was to ſettle this Matter about Proviſors.* And the Commons again yielded, *The King ſhould have ſuch a Power to moderate it, as he ſhould with his Council judge expedient; but ſo as it be all laid open before the next Parliament, that they might upon good Advice agree to it.*

Rot. Parl. 16. R. 2. n. 8.

Rot. Parl. 17 R. 2. n. 22. 17 *R.* 2. *Tydeman*, Abbot of *Beauley*, was by the *Popes Proviſion*, made *Biſhop of Landaff*. But the King, notwithſtanding the former Proceedings, did not take upon him to *diſpenſe* with the Statute, but left it to the *Parliament*; and his *Diſpenſation* was paſſed by Act of Parliament, the King, Lords and Commons aſſenting thereto.

Rot. Parl. 20 R. 2. n. 21. 20 *R.* 2. The Commons in Parliament do again Aſſert *de bon gre de leur parte en plein Parlement*, That *the King with his Council may diſpenſe with the Statute of Proviſors, as ſhall ſeem fit, ſo as the ſame be heard and examined the next Parliament, and ſo corrected as ſhall be thought convenient by the King, with the Advice of his Council in Parliament.*

Rot. Parl. 1 H. 4. n. 85. 1 *H.* 4. The Commons in like manner give their Aſſent, That *the King ſhould have the ſame Power of Diſpenſing with the Statute, which his Predeceſſors had, and to Repeal and Annul it, as ſhould ſeem expedient to him.* Which was no more than a *General Diſpenſation*. Yet notwithſtanding this was recorded in Parliament.

Rot. Parl. 2 H. 4. n. 26. 2 *H.* 4. The Commons appearing before the King and the Lords, it was declared, That the *Diſpenſation* ſhould not extend to *Cardinals* or other *Strangers*. At the ſame Parliament a Petition was preſented to the King, That if any one did accept a Benefice by *Papal Proviſion*, againſt the *Statute*, and had his Pardon from the King for it; yet if he went about to diſturb the preſent Poſſeſſor, by virtue of his *Proviſion*, then his Pardon ſhould be void, and he ſhould incur the Penalty of the Statute. To which the King gave his Aſſent.

n. 42.

Rot. Parl. 7 H. 4. n. 134. 3 *H.* 4. The King having granted *particular Licenſes* for *Diſpenſations* as to this *Statute*, and finding the great Inconveniences which came by them, he generally and univerſally revovoked them, and promiſed in *Parliament* to find out ſome proper Remedy in this Matter.

Rot. Parl. ib. 7 *H.* 4. The King was moved in Parliament to confirm that *Revocation*; but he then took time to conſider. But 9 *H.* 4. *c.* 8. the King reinforced in Parliament all the *Statutes* againſt *Proviſors*; as it is in Print.

Rot. Parl. 1 H. 5. n. 22. 1 *H.* 5. The Commons pray, That *the Statutes may ſtand in full force againſt* Proviſors; *and that no Protection or Grant made by the King to hinder the Execution of the ſaid Statutes, ſhall be allowable, or of any force; and whatever is done contrary to them, ſhall be null.*

The Anſwer is, *Let the Statutes be obſerved and kept.* But if the Statutes were to be ſtrictly obſerved, what *ſaving* can there be

be *to the King's Prerogative?* ſince the *Statutes* were *Univerſal*, and the *King's particular Grants* in this Caſe were the great Motive of the Commons Deſire to have them reinforced, in the beginning of this King's Reign: And theſe *Statutes* continued in full Force to the Time of *H.* 8. inſomuch that Cardinal *Woolſey* was proſecuted by the King's Attorney, for offending againſt them by his *Legatine Power*, although he had the King's Aſſent to it, and he exerciſed it ſeveral Years by his Permiſſion. *Stephen Gardiner*, in his Letter to the *Protector*, ſaith, *That he obtained his Legatine Power by the King's Aſſent:* From whence he obſerves, *What Danger they may fall in, who break the Law with the King's Conſent*; for in the *Cardinal*'s Caſe, he ſaith, *That becauſe his Legatine Power was againſt the Laws of the Realm, the Judges conclude the Offence to be ſuch as incurred the Præmunire: And this he Aſſerts was the Senſe of the Lawyers of that Time*; and for confirmation of it, he brought the Caſe of the Lord *Tiptoft*, *who ſuffer'd on* Tower-Hill, *becauſe in execution of the King's Commiſſion, he had offended againſt the Laws of the Realm: And of many Judges who had Fines ſet on their Heads in like Caſe, for acting againſt the Law of the Realm by the King's Commandment.*

But it is pleaded on the other ſide, *That the Commons*, 1 H. 5. *n.* 22. *put in the ſaving the King's Prerogative into their Petition concerning the Statute of Proviſors, that it may ſtand in full Force: And this was an owning the King's Diſpenſing Power by all the Commons in Parliament, when they were in a high Debate with the Crown.* Short account, p. 25.

This ſeems to have a good ſhew of Reaſon to any one that doth not conſider the Practice of thoſe Times, in Acts of Parliament; for the Petitions of the Commons, before 2 *H.* 5. were not taken entire and juſt as they delivered them; but ſeveral *Clauſes* were inſerted by the Court, eſpecially ſuch as ſeemed to preſerve the *King's Prerogative*; which the Commons found ſo inconvenient, That the next Year, as Serjeant *Glanvil* obſerved, (and probably on the Occaſion of theſe *Savings*, 1 *H.* 5. n. 15, and n. 22.) the Courſe was altered, and hath ſo continued. *Ruſhworth's* Collections, *vol.* 1. *p.* 574.

Therefore methinks ſo great Weight ſhould not be laid on theſe *Savings*, as if they implied the owning the *Diſpenſing Power*, when the Deſign of the Law was againſt it. And the King's Anſwer is, *Let the Statutes be held and kept.*

I appeal to any Man's Underſtanding, whether *the ſaving the King's Prerogative* can be any other than a *General Clauſe* put in, without reſpect to the *Diſpenſing Power*; ſince the *Petition* is againſt the *Exerciſe* of it, and the Anſwer, *That the Statutes ſhould be obſerved?* If they were obſerved, what Uſe of the *Diſpenſing Power*; for that lay in giving leave not to obſerve them? What ſtrange Senſe is this, The King promiſes, *The Statutes ſhall be kept, ſaving his Prerogative, that they may not be kept?* for, they feared the not keeping them from ſuch a *Prerogative:* and when the King therefore Yields *they ſhall be kept*, he doth give up any ſuch *Prerogative*, or elſe he doth not anſwer their Petition.

The

The Truth is, when the Kings had got this Power into their Hands, though it were with ſuch Limitations at firſt, yet they found Arts from time to time to keep it, till at laſt they were unwilling to part with it; as appears by *H.* 4. but upon the reſtleſs Importunity of the Commons it was laid down by him. And now in the beginning of *H.* 5. the Commons took Care to prevent its Riſing in a new Reign; but he being a Prince not ready to part with any thing which looked like Power, was in probability, not eaſie to be brought to confirm the *Statutes* of *Proviſors*, without ſome general Words of *ſaving his Prerogative*, which the *Commons* might yield to, that they might gain the main Point; ſince thoſe Words could ſignifie nothing againſt the very *Intention* and *Deſign* of the *Law*.

IV. The *Precedents* in *Law* do contradict this Rule; as will appear by thoſe which are produced by the Lord Chief Juſtice *Vaughan*, in the Caſe of *Thomas* and *Sorrel*.

Vaugh. Rep. *f.* 337.

1. The King cannot Diſpenſe with a *Common Nuſance*, for *The King*, he ſaith, *cannot Pardon continuing Nuſances; but the Penalty he may.*

f. 339. *The King cannot Diſpenſe with a Nuſance to the High Ways, by* 11 *H.* 7. *he cannot Pardon or Diſcharge the Nuſance, or the ſuit for the ſame, the High-ways being neceſſary for ſuch as Travel*; but *Common Nuſances* are not *mala in ſe*, which are not *Evils at Common Law* (as ſome underſtand them) but things ſo *intrinſecally Evil, that no Circumſtances can make them lawful. Malum in ſe* is a *Moral Evil*, in its own Nature; and therefore can never be *Diſpenſed* with; but a *Nuſance at Common Law* is but a *Natural Evil*, and all the *Moral Evil* of it lies in the *Prohibition* by Law: And yet in theſe, it is granted, That the *King* cannot *Diſpenſe*: And the *Year-Book* ſaith, *That a Licence to make a Nuſance in the High Way were void*: For what Reaſon? Is it a thing forbidden by the Natural or Divine Law? Cannot the *King*, for his Will and Pleaſure, *Licenſe the Making a Nuſance?* and yet is it poſſible for Men of Senſe to imagin, That he can by his *Diſpenſing Power* give leave to do ſuch things, as in conſequence overthrow our Laws and Religion? Doth the Law take greater Care of the *High-Way* than of our *Liberties* and *Religion?* This would ſeem ſtrange Doctrine to People of another Country, *viz. That by the Law of* England *the King hath no Power over the High-Way, to Diſpenſe with a Common Nuſance therein, but he hath over the Laws made for the moſt Publick Good and Security of the Nation.* And truly this cannot but ſeem ſtrange to as many among our ſelves, as allow themſelves the *Liberty* of *thinking*; Doth *the Law only take care of Oxen and High-Ways?*

f. 358. But it is well obſerved by the Learned Chief Juſtice *Vaughan*, That *Publick Nuſances*, are not *mala in ſe*, but *mala politica & introducta*; and *when a thing is ſaid to be prohibited by the Common Law*,

Law, the meaning is no more but that the Ancient Record of ſuch a Prohibition is not to be found

2. *The King cannot Pardon the Damage done to particular Perſons,* ſaith the ſame *Chief Juſtice, where the Suit is only the Kings, but for the Benefit and Safety of a third Perſon, the King cannot Diſpenſe with the Suit, but by Conſent and Agreement of the Party concerned.* And again, f. 333. f. 334.

Penal Laws, the Breach whereof are to Men's particular Damage, cannot be Diſpenſed with. f. 335.

And the *Chief Juſtice Herbert* owns, *That the King cannot Diſpenſe with Laws which veſt the leaſt Right or Property in any of his Subjects.* f. 29.

Here we ſee, the Prerogative bounded, where the *Intereſt of particular Perſons is concerned*; but doth the Law take more Care of them than of the *Publick Intereſt*, and the concernment of the whole Nation?

But I find another Diſtinction in this Caſe, *viz.* "There is "*Bonum Publicum*; and Laws made for that may be *Diſpenſed* "*with*: And there is *Bonum ſingulorum Populi*; and with *Laws* "that concern that *the King cannot Diſpenſe.* Short Account, p. 21.

This is admirable Learning, if it be brought out of theſe Terms: And the meaning is, The King can do nothing to the *Prejudice* of the People in their *Private Capacities*, but he can do what he will with the *Publick*. I had thought, a Prince had been, in the firſt Place, bound to regard the *Good* of the *Publick*, and to take Care of the *ſalus Populi complicati*, (as it is called) *i. e.* as they are imbodied together, and not of the Private *Intereſts* of particular Men, which can never be preſerved, when the Publick Safety is not ſecured.

3. It is granted, *That in Penal Laws, by Act of Parliament, where the Offenders are puniſhable at the King's Suit, but where the Offence is to the immediate Wrong of Particular Perſons, and for which the Law gives them ſpecial Actions, the King cannot Diſpenſe.* 7. R. f. 342.

Never was Law more tender of the *Intereſt* of *Particular Perſons* than ours: But ſuppoſe a *Penal Law by Act of Parliament*, relates immediately to the *Publick*, and gives no particular Perſons *any Special Actions*; is ſuch a *Law* therefore *Diſpenſable*, becauſe only the *Publick Good*, and the *Safety* of the *Nation* are concerned? which are not (it ſeems) to be valued with the Private *Intereſts* of *Particular Men*. They who affirm ſuch things, may be very learned in Book Caſes; but they do not ſeem to have ſtudied the *Jus Publicum*, as *Bracton* calls it, which concerns *Statum Reipub.* or the *Political Law* of this Nation; which ſhews the great Reſpect which the *Good* of the *Community* ought to have above *Private Intereſts*: But when Perſons take up their Notions and Maxims, from Laws relating to *Meum* and *Tuum*, they are very apt to judge of *Publick Laws*, according to thoſe *Meaſures*. Bract. l. c. 5. n. 2.

f. 349. 4. It is granted, *That the King cannot licenſe a Baker, Brewer, or Victualler to break the Aſſize of Bread or Ale, nor a Miller to take more Toll than the Law appoints* (therefore theſe are *mala prohibita*); *nor a Taverner to break the Aſſize of Wine*; *Nor a Butcher to ſell meaſled Swines-Fleſh or Murrain Fleſh*; *nor any Man to foreſtal the Market, by a* non obſtante *of the Statute* de Piſtoribus; *which prohibits all theſe under ſeveral Penalties.*

Nor can he licence Butchers, Fiſhmongers, Poulterers, or other Sellers of Victuals; *nor Hoſtlers to ſell Hay and Oats at what Price they pleaſe, by a* non obſtante *of the Statute of* 23 E. 3. c. 6. and 13 R. 2. c. 8.

Still the Law is extreamly tender of us, as to *Meat* and *Drink*, and not only for our ſelves, but for our *Horſes* too; ſo that the *King* cannot *Diſpenſe* with the Laws about them: And yet can we think ſo meanly of the Wiſdom of our Anceſtors, that they would take ſuch Care of *Bread*, and *Wine*, and *Horſe-Meat*, that the King himſelf could not inhance the Price of them; but that as to their *Laws*, which relate to the *Publick*, they were content to leave them to the *Will* and *Pleaſure* of their Prince? No one that reads the *Hiſtory* of our *Anceſtors*, and the *Conteſts* they had with *Kings* to obtain their *Publick Liberties*, could ever entertain ſuch a Thought concerning them.

f. 344. 5. *If Foreign Manufactures or Foreign Corn be prohibited for ſupport of the Natives, a Licence to one or more, to bring them in, if General, is void by the Caſe of Monopolies, notwithſtanding a* non obſtante.

This is certainly *Malum prohibitum*; and yet the King cannot *Diſpenſe* with it. And it is really a very hard Caſe, if the King cannot *Diſpenſe* with a *Monopoly* in Trade, and may Diſpenſe with a *Monopoly* in *Religion*, *i. e.* That notwithſtanding all the Laws for ſetling our *Religion* at Home, he may grant a *Licence* to *Foreigners* to introduce another, although never ſo repugnant to our Laws; for none who underſtood our Affairs, could imagine, That this *Diſpenſing Power* was ſet up for any other End.

But what ſhall we ſay to the *Precedents* on the other ſide? I ſhall paſs by others, which have been ſufficiently anſwered already, and only ſpeak to that which above all others hath been declared to be the Foundation of the *Diſpenſing Power*; and therefore deſerves to be farther cleared; and that is,

Short account, p. 9. The Caſe of *Diſpenſing with the Statutes about Men's continuing Sheriffs more than a Year*; which is urged as plain and concluding, becauſe *it was for a Publick Good, and preventing great Miſchiefs*; *yet the King's Power of Diſpenſing in this Caſe was allowed by all the Judges of* England, 2 H. 7. *and this hath been cited as adjudged in ſeveral Books of great Authority*, Fitz-Herbert, Plowden, Coke, *&c. and the Practice hath ever ſince been accordingly.*

This

This is the whole ſtrength of the Argument. And I ſhall not repeat what others have already ſaid, to ſhew that this was not the *Reaſon* of the *Judicial Sentence* then given; but the particular *Ground* of *one* of the *Judges*, *after they had declared the Patent to be good.* But however that were, it cannot be denied, that great *Lawyers* ſince that time, have taken it to have been the Senſe of the Judges then. For *Coke*'s Words are expreſs in *Calvin*'s Caſe; *It is Enacted by the Parliament of* 23. H. 6. *That no man ſhould ſerve the King as Sheriff of any County above one Year, and that notwithſtanding of any Clauſe of* Non-obſtante *to the contrary, that is to ſay, notwithſtanding that the King ſhould expreſly diſpenſe with the ſaid Statute; howbeit, it is agreed in* 2 H. 7. *That againſt the expreſs purview of that Act, the King may by a ſpecial* Non-obſtante *diſpenſe with that Act.* 7 R. 14.

Here it is plain, that in *Coke*'s Opinion, at leaſt, the Judges did agree, that although King and Parliament had made an Act which made void any Grant with a *Non obſtante*, yet that ſuch a Grant made afterwards, with a ſpecial *Non obſtante*, was good.

I am not much concerned, whether it were their Opinion or not; becauſe I think there is much greater *Reaſon*, and ſtronger *Authority* on the other ſide.

1. As to *Reaſon*: If a *Non-obſtante* from the *King*, be good, when by *Act* of *Parliament* a *Non-obſtante is declared void*, what doth an *Act* of *Parliament* ſignifie in ſuch a Caſe? Muſt we ſay, *It is a void Clauſe?* But then to what purpoſe was it put in? Did they who made the *Act*, underſtand it to be a *void Clauſe* when they put it in? Certainly, it was then thought otherwiſe; and if it were ſo, we have the *Authority* of the *Parliament* againſt the *Opinion* of the *Judges*. If it were not *a void Clauſe* then, how came it to be ſo afterwards? What *Alteration* was made in the *Law of England* in that Interval, and by whom? How comes a *Clauſe* that had force in 23 *H.* 6. to have none, 2 *H.* 7? Could *Radcliff* or the reſt, by their Opinions, deſtroy the *Force* of an *Act* of *Parliament?*

No; But *Coke* ſaith, *No Act can bind the King from any Prerogative which is ſole and inſeparable from his Perſon; but he may diſpenſe with it by a* Non-obſtante, *as a Sovereign Power to command any of his Subjects to ſerve him for the Publick Weal, and this ſolely and inſeparably is annexed to his Perſon; and this Royal Power cannot be reſtrained by any Act of Parliament, neither in* Theſi *nor in* Hypotheſi; *but that the King by his Royal Power may diſpenſe with it; for upon the Commandment of the King and Obedience of the Subject, does his Government conſiſt; as it is provided by the Statute of* 23 H. 6. *c.* 8. *That all Patents made or to be made of any Office of a Sheriff,* &c. *for Term of years, or for Life, in Fee-ſimple or in Tail, are void and of none effect, any Clauſe or Parol of* Non-obſtante *put or to be put into ſuch Patents to be made notwithſtanding. And further, Whoſoever ſhall take upon him or them to accept or occupy ſuch Office of Sheriff, by vertue of ſuch Grants or Patents,* 12 R. f. 18.

Patents, ſhall ſtand perpetually diſabled to be or bear the Office of Sheriff within any County of England, *by the ſame Authority. And notwithſtanding that by this Act*, 1. *The Patent is made void.* 2. *The King is reſtrained to grant a* Non-obſtante. 3. *The Grantee diſabled to take the Office, yet the King by his Royal Sovereign Power of commanding, may command by his Patent (for ſuch Cauſes as he in his Wiſdom doth think meet and profitable for himſelf and the Commonwealth, of which he himſelf is ſole Judge) to ſerve him and the Weal Publick, as Sheriff for ſuch a County, for years or for Life,* &c. *And ſo was it reſolved by all the Juſtices of* England *in the Exchequer Chamber*' 2 H. 7.

Here the Point is reſolved into *an inſeparable Prerogative in the King*; which no *Act of Parliament* can reſtrain, although made with his own Conſent. Is there no *Act* of *Parliament* then, which this great Lawyer will allow to reſtrain *the King*'s *Prerogative*, ſo as he cannot *diſperſe* with it? What ſaith he to the Caſe of *Buying Offices at Court*? Cannot the King by vertue of his *Prerogative*, order his Houſhold as he pleaſes, to diſpoſe of Offices about him, as he thinks fit; No. The ſame Lawyer ſaith, That *no* Non-obſtante *could diſpenſe with the Act againſt buying of Offices*. And yet one would think that the King had as great a *Prerogative* in the *Court*, as over the *Kingdom*.

1 *Inſt.* 234.

But how comes he to ſay, *That the King can diſpenſe notwithſtanding the Diſability*, when elſewhere he ſaith, *The King cannot diſpenſe in the Caſe of a Diſability by Law?* For the Reaſon he gives why the *King cannot preſent* a Man to a Living who is convict of *Simony*, is, becauſe *the Law hath diſabled him*. Very well. And yet in this Caſe, although the *Law hath diſabled him*, the *King* may *diſpenſe*. Where are we now? The *King* can *diſpenſe* with a *Diſability*, and he cannot *diſpenſe* with it. This is indeed a very *dark learning of Diſpenſations*, as C. *Juſtice Vaughan* well called it; for we cannot yet find the way through it.

1 *Inſt.* 120.
3 *Inſt.* 154.

Can the *King diſpenſe with a Diſability in Law* or not? If not, the *Caſe of Sheriffs* is gone. If he can, then why not in the caſe of *Symony*? Why not, as to *ſitting in Parliament without taking the Oaths*? No, here *is a Diſability in Law*. What then? Cannot the K. diſpenſe with a *Diſability in one Caſe*, as well as *the other*? But the ſame Perſon ſaith, That in that Caſe, *becauſe the Words amount to a Diſability, the King cannot diſpenſe*, and here, where the *Diſability* is expreſſed, he may.

3 *Inſt.* 154.

Short Account, p. 38.

But we are lately told, there are two ſorts of *Diſabilities*; one is *actually incurred, as that upon the Members who ſit without taking the Oaths*; *and the other is a Diſability annexed to the Breach of a Law, as a penalty, and that penalty not to be incurred before a Legal Conviction; and in this Caſe the King's Diſpenſation coming before the Conviction doth prevent it, by making that lawful which would not have been ſo without it. But when a Diſability is actually incurred, it cannot be taken off but by Act of Parliament.*

P. 30.

I Anſwer,

I Anſwer, That if the *Law* which *makes the Diſability*, doth allow of a *Diſpenſation* antecedent to the *Conviction*, then I grant that the *Diſpenſation* before *Conviction*, prevents the *Diſability*. As in *Digby*'s Caſe; if the *Diſpenſation* had come before *Inſtitution*, the *Diſability*, as to holding the former Living, had been prevented; becauſe the Law doth expreſly allow of a *Diſpenſation* in the Caſe. But here is no ſuch thing. The Act of Parliament, ſuppoſes no *Diſpenſation*, but makes an *utter Diſability*, as to the holding the Office, in Sir *Edward Hales* his Caſe; but a *diſpenſing Power* is ſet up againſt the *Act of Parliament*, and ſuch a *Diſpenſation* neither before nor after *Conviction*, can prevent a *Diſability*. If it could, I can by no means ſee why it might not as well hold as to Members of Parliament, (at leaſt as to the *Oath* of *Supremacy*) if they take their *Diſpenſation* before Sitting in the Houſe. For the *Diſability* doth not take place till they enter the *Parliament*, 5 *Eliz. c.* 1. *And he that entreth the Parliament without taking the ſaid Oath, ſhall be deemed no Knight, Citizen, Burgeſs, or Baron, nor ſhall have any Voice, but ſhall be as if he had been never Returned or Elected.* 4 Rep.

The Intention of the *Law* for the *Teſt*, was a *diſability to hold the Office*; but it allows time for Perſons to qualifie themſelves, as appears by the *Act* for the *Teſt*. Is not this plain overthrowing the *deſign* of the *Law*, for Perſons inſtead of doing what the Law requires, to take out a *Diſpenſation* for not doing it, and ſo prevent the Diſability? And what doth a Law ſignifie, when the very *deſign* of it is overthrown? And what is the Power of making Laws by common Conſent in Parliament, if without ſuch Conſent, the whole force of the Law may be taken away by a *diſpenſing Power?* So that this doth not meerly make Laws to ſignifie nothing but according to *Will and Pleaſure*; but it makes our very *Conſtitution* inſignificant; which requires to every Law the Conſent of the People in Parliament.

As for Inſtance, By the *firſt Conſtitution* of the *Roman Government*, the *King had the cuſtody of the Laws, but no Laws were to be made but by the Conſent of the Roman People in the* Curiæ, (thence called *Leges Curiatæ*) Would any one have thought this any Privilege, if after theſe Laws were paſſed, the King ſhould claim *an inſeparable Prerogative of diſpenſing* with them as he ſees Cauſe? For it is implied in ſuch a Fundamental Contract as this, that Laws when made, ſhould not loſe their Force without their Conſent who made them. Elſe it is not *Contractus bonæ Fidei.* *Dionyſ. Halyc. Arn.* l. 2.

I will not diſpute whether this were the *Original Contract* of our Nation or not; but this I may ſay, That when our *Government* came to a Settlement, after long ſtruglings, this was one of the *Fundamental Articles* of it, That *no Laws ſhould paſs, or Burdens ſhould be laid upon the People but by their own Conſent in Parliament.* *Bracton* ſaith, That *a Law among us, ſuppoſes the* *Bract.* l. 1. c. 3. 1.

Authority of the Prince and the Council, and Conſent of the great Men, and Agreement of the Common-wealth.

L. 1. c. 2. n. 6. And he adds further, That our Laws being thus made and eſtabliſhed, *mutari non poterunt, nec deſtrui ſine communi Conſenſu & Conſilio eorum omnium quorum Conſilio & Conſenſu fuerunt promulgatæ:* Which are very remarkable Words againſt a *diſpenſing power.* For that doth imply a *Power to change the Law,* and in effect, *to deſtroy it,* without the Advice or Conſent of thoſe that made it. He ſaith indeed, *The Law may be improved without their Conſent, i. e.* by the Judges *Interpretation* as to *parallel Caſes* not expreſſed. But if any *new or hard Caſe* happens, it ought, he ſaith, to be reſpited *uſque ad magnam Curiam, i. e.* to the Parliament, *ut ibi per Concilium Curiæ terminentur;* that being the *Supreme Judicature* of the Nation.

Forteſcue, 2. c. 13. f. 32. *Forteſcue,* who very well underſtood our *Conſtitution,* ſaith, That *the King, although he be the Head of the* Political Body, *can neither change our Laws, nor take away* Property *without Conſent.*

C. 18. f. 40. And that our Laws are made, *not by the* Princes *Will, but by General Conſent; Totius Regni Aſſenſu:* He ſaith, *They may be changed, but it muſt be, Non ſine Communitatis & Procerum Regni Aſſenſu, quali ipſæ primitus emanarunt.*

C. 34. 35. He takes notice, That *ſeveral of our Kings did not like our Conſtitution, but affected a more Arbitrary, and therefore approved the Civil Law, for that Maxim, Quod Principi placuit Legis habet vigorem.* But he ſhews our Conſtitution to be better *for* C. 36. f. 84. *King and People.* For here he ſaith, *The King levies no Taxes, nor alters Laws, or makes new ones, ſine Conceſſione vel Aſſenſu totius Regni ſui in Parliamento ſuo expreſſo..*

But certainly *diſpenſing* with Laws, is *altering them;* not as to their Words, but as to the Intention and Deſign of them, which is the main thing in a Law; and he that alters the Law, as to any one, whoſe Caſe is common with others, may alter it as to all others in equal Circumſtances. And what doth ſuch a Law then ſignifie?

In the *Charter* of King *John,* the *Commune Conſilium Regni,* was *to paſs all Aids; and beſides particular Summons to the Great Men, general Summons were to be given to others, to appear within forty days; and if they did not, Matters were to go on however.* This very *Charter,* as appears by *Matt. Paris,* was renewed, 9 *H.* 3. But he had learned the Trick of a *Non obſtante* from his good Friend the Pope; and when he was urged with his *Matt. Paris,* f. 854. own Grants, he ſaid, *Doth not the* Pope *void his Grants with a* Non-obſtante? *Why may not I do the ſame by the Grants of* my Self *and* my Predeceſſors? To whom a ſharp Reply was made. *As long as he obſerved Juſtice in his Actings, he would be King, and no longer.* Which I only mention to ſhew, that the Uſe of a *Non obſtante* was then looked on as a Violation of Juſtice.

And

And ſo it muſt needs be, if our Laws, as *Bracton* ſaith, be *Communis Reipub. Sponſio*; for then they are of the *Nature of Contracts*, and when Laws are ſo, it is agreed by thoſe who write of theſe Matters, although otherwiſe no Enemies to a *Diſpenſing Power*, That they are *not to be Diſpenſed with* by a *non obſtante*.

If a Prince makes a Grant of any thing wherein he hath Power to oblige himſelf in Juſtice, it becomes, ſaith *Baſelius Pontius*, *of the Nature of a Contract, which gives a Right to thoſe to whom it is made, and lays an Obligation of Juſtice upon him.* *Baſel. Pontius De Matr. l. 8. de diſpenſat. c. 5. n. 7.*

Where a Grant is made for the Benefit of others, and is accepted by them, it is not in the Granter's Power to revoke it, as *Sanchez* ſhews from many Authorities. *Sanchez de matr. l. 8. diſpenſ. c. 17. n. 29.*

And the *Lawyers* are of the ſame Mind, as appears by what is already produced out of *Baldus* and others; but I ſhall mention ſome who declare the Opinion of others.

Explorati juris eſt eas Conſtitutiones quæ in contractum tranſeunt ita ligare Principes ut iis derogare nequeant, ſaith *Gerl. Buxtorffius*. *Buxtorff. in auream bullam, c. 1. ſect. 7.*

Gail ſaith, *That Princes are bound by all Grants made* per modum contractus de Jure Communi; and that is the general Opinion. *Gail. obſerv. l. 1. obſ. 41. n. 4*

One of the lateſt Writers *de Jure Gentium*, ſaith, *That Princes are more ſtrongly bound by Laws, which paſs by way of Contracts, than by any poſitive Laws made by Abſolute Power, Although they relate to the weightieſt Points of Government.* *Joh. Wolfg. Textor. de jure gent. c. 11. n. 26.*

That a Prince cannot grant a non obſtante *to ſuch Laws as he hath ſworn to obſerve*; is not only the Opinion of other *Lawyers*, but of ſome of the higheſt *Canoniſts*: And it is a Rule among them, That no Clauſe of *non obſtante* can take away *Conſtitutionem Juratam*. *Bellug. ſpic. Princ. rubr. 7. n. 4. Hier. Grat. conſ. 41. n. 21. Rol. a valle, conſ. 62. n. 5. vol. 2. Celſus Hugo, de clauſulis, n. 23.*

Where there is therefore not only a *Contract* with others in the paſſing of a *Law*, but an *Oath to obſerve the Laws*, I do not ſee how a *non obſtante* or a *Diſpenſing Power* can take Place.

2. We have the *Advantage* in Point of *Authority* as well as *Reaſon*, as to this very Caſe of *Diſpenſing with the Statute of* 23 H. 6.

For I take it for granted, That the *Authority* of *Parliament* is more to be regarded than the *Opinion* of *Judges*: And I think we have good Reaſon to believe, That the Parliament did not think this Act could be voided by a *non obſtante*.

(1.) The *Parliament* that declared, any *non obſtante againſt the Act to be void*, was certainly of that Opinion; or elſe they did a ridiculous thing, to put in a Clauſe which was *void of it ſelf*.

(2.) The *Parliament*, 28 *H. 6. c. 3.* was of that Mind; for what need *an Indemnity by Act of Parliament*, if the King could by his *Diſpenſing Power* have made it lawful for the *Sheriffs* to continue?

(3.) The

(3.) The Parliament, 8 *E.* 4. 4. continued in the ſame mind, for, whereas in the beginning of his Reign *Sheriffs were continued more than a Year, by reaſon of the Troubles*, it was not then thought, (though in a Caſe of ſuch *Neceſſity*) That the King could *Diſpenſe with this Law*; but they were *indemnified by Act of Parliament*, and the *Act declared to ſtand in full Force.*

(4.) the Parliament, 6 *H.* 8. *c.* 18. after the ſuppoſed *Judgment*, 2 *H.* 7. And in the time of a Prince who would loſe none of his Prerogatives, was ſtill of the ſame Judgment; for it not only recites the *Statute*, but particularly takes notice of the *voiding all Pardons* and *non obſtante's*; and *by Act of Parliament indemnifies the Under-Sheriffs of* Briſtow, *and gives them the ſame Priviledge which thoſe of* London *had.* What need all this, if it had been thought *good Law* at that time, that the *King might by his Diſpenſing Power have given Sheriffs leave to have acted againſt that Statute?*

And now I leave any Man of Reaſon to judge, Whether this famous Caſe be a ſufficient Foundation for the ſeting up a *Diſpenſing Power*, either as to a *Particular Statute* made for the *Security of our Religion*, or for *a Suſpenſion of our Eccleſiaſtical Laws.*

CHAP.

CHAP. IV.

Of the Alterations made in the Supremacy, by the Statutes of Henry *the Eighth; with an Anſwer to the Objections.*

I Now come to the *Alterations* made in our *Laws*, about the *King's Supremacy* in the Time of *Henry* the Eighth.

24 *Hen.* 8. *c.* 12. An *Act* paſſed *for taking away all Appeals to* Rome, *which is founded on the King's Natural and Independent Right of Governing, and doing Juſtice to all his People; and the Sufficiency of his own Clergy, for Hearing and Determining ſuch Matters as belonged to their Function; and therefore all Cauſes are to be Heard, Diſcuſſed, Examined, finally and definitively Adjudged and Determined within the King's Juriſdiction and Authority, and not elſwhere in the Courts Spiritual and Temporal: But if the King be concerned, then it is referred to the Upper-Houſe of Convocation.*

The *Preamble* of this *Act* againſt *Appeals to* Rome, is conſiderable: *Whereas by divers Authentick Hiſtories and Chronicles, it is manifeſtly declared and expreſſed, That this Realm of* England *is an Empire governed by one Supreme Head and King,* &c. *with plenary, whole and entire Power, Preheminence, Authority, Prerogative and Juriſdiction* &c. *for final determination of Cauſes,* &c. ſo that here is an *Appeal to Ancient Hiſtory* in this Matter, and we have ſtill ſufficient Evidence of it before the *Popes Encroachments* prevailed.

The *Biſhops* and *Barons* told *Anſelm*, in *William Rufus* his time, *It was a thing unheard of, and contrary to the Cuſtom of his Realm for any one to go to* Rome *without the King's Leave*; which is after explained *by way of Appeal: Anſelm* made but a ſhuffling Anſwer to this, *although he had ſworn to obſerve the Cuſtoms of the Realm,* and he could not deny this to be one, but he pretended, *It was againſt S.* Peter's *Authority, and therefore could not obſerve it*; *for this were,* ſaith he, *to abjure S.* Peter. From whence I infer, That the Cuſtom of the Realm, was then thought by *Anſelm* to be inconſiſtent with *the Pope's Authority:* For whatever they talk of S. *Peter*, it is the Pope they mean.

In the Reign of *H.* 1. the Pope complains grievouſly, *That the King would ſuffer no Appeals to be made to him; and that due Reverence was not ſhewed to S.* Peter *in his Kingdom; and that they ended Eccleſiaſtical Cauſes at Home, even where Biſhops were concerned; and very learnedly quotes the Decretal Epiſtles againſt them.* *Eadmer. f.* 113, 115.

f. 118, 121. Afterwards, the Pope ſent *his Legate*, and the King denied him *Entrance*, and *the whole Parliament rejected it, as contrary to the Ancient Cuſtom and Liberty of* England.

That Paſſage in the *Laws* of *H.* 1. *c.* 5. which ſeems to allow of *Appeals*, is a *mere Forgery*, the whole Chapter being a *Rapſody* taken out of the *Canoniſts*.

Hunt. f. 226. *H. Huntingdon* ſaith, *That Appeals were brought in in King* Stephen's *time, by* Henry *Biſhop of* Wincheſter, *his Brother being the Pope's Legate.*

By the Conſtitutions of *Clarendon*, *c.* 8. *the Appeal lay from the Archbiſhop to the King*, which is well expreſſed by *Robert* of *Glouceſter*.

And the K. amend ſolde the Erchiſhops deed,
And be as in the Pope's ſted, and S. Thomas *it withſteed.*

And although *H.* 2. in his *Purgation* for the Death of the Archbiſhop, did ſwear, *That he would hinder no Appeals to* Rome *in Eccleſiaſtical Cauſes*; *and that he would quit the Ancient Cuſtoms of the Realm*: Yet *Hoveden* ſaith, *The Conſtitutions of* Clarendon *were renewed in the Parliament at* Northampton, *and the Juſtices in Eyre were ſworn to obſerve them, and to make others obſerve them inviolably*: *And for thoſe who went out of the Kingdom* (in Caſe of *Appeals*) *the Juſtices were to enquire* per conſuetudinem Terræ, *according to the Ancient Cuſtom*; *and if they did not return and ſtand to the King's Court, they were to be outlawed.*

Hoveden, f. 426,433,465. In the Time of *R.* 1. the Popes complained much of *Geofry*, Archbiſhop of *York*, for ſlighting *Appeals made to* Rome, *and impriſoning thoſe that made them. Celeſtine* doth it twice, and in the ſame Words: And *Innocent* the Third, in King *John's* Time, renews the ſame Complaint of him, *That he ſhewed no regard to Appeals made to the Apoſtolick See.*

But when the *Rights of the Crown* were given up by King *John* to the *Pope*, no Wonder if the *Liberties of Appeals* were granted by him: But yet, in the ſucceeding Reigns, we have ſeveral Inſtances upon Record of Perſons impriſoned by the King, for making *Appeals* to *Rome*.

K. *James* his Premon. *p.* 300. *John* of *Ibſtock*, in the Time of *E.* 1. The *Abbot* of *Walden*, and a *Prebendary* of *Banbury*, in the Reign of *E.* 2. The Parſon of *Leighe*, *Harwoden*, and the Prior of *Barnwel*, in the time of *E.* 3. So that this *Right* was ſtill owned by our Princes, when the Matter came into Conteſt, and therefore the Act of *H.* 8. againſt *Appeals* was but a juſt *Reſuming* of the *Ancient Rights* of the *Crown*.

25 *H.* 8. *c.* 19. A *Commiſſion* is appointed *for reviewing the Canons*: And it is obſervable, That becauſe it could not be done in *Parliament Time*, the *King* hath *Power given him by Act of Parliament to nominate the thirty two Perſons to act in this Matter*, in theſe Words; *Be it therefore enacted by the Authority aforeſaid, That the King's Highneſs ſhall have Power and Authority to nominate*

nate and aſſign at his Pleaſure the ſaid thirty two Perſons of his Subjects; whereof ſixteen to be of the Clergy, and ſixteen to be of the Temporality of the Uppper and Nether Houſe of Parliament.

And becauſe the laſt Reſort was to the *Arch-Biſhop* in the former *Act of Appeals*; therefore to prevent any Inconveniences thereby, a *new Power* is granted by this Act, *i. e. Upon an Appeal to the King in Chancery, a Commiſſion is to be directed to ſuch Perſons as the King ſhall appoint, who are to hear and determine ſuch Appeals, and the Cauſes concerning the ſame.*

25 *H.* 8. *c.* 21. After the *Submiſſion of the Clergy*, and the King being owned *Supreme Head*, yet the *Power* of *diſpenſing* with the *Canons* in particular Caſes, did not paſs by *Commiſſion* from the King, but by *Act of Parliament*. The Words are, *It ſtandeth therefore with natural Equity and good Reaſon, that all and every ſuch Laws human, made without this Realm, or induced into this Realm by the ſaid Sufferance, Conſents and Cuſtom, Your Royal Majeſty, your Lords Spiritual and Temporal, and Commons repreſenting the whole State of your Realm, in this your High Court of Parliament, have full Power and Authority not only to diſpenſe, but alſo to Authorize ſome elect Perſon or Perſons, to diſpenſe*, &c. So that the Power of granting *Faculties* at a time when the *Prerogative* was higheſt, was not executed by *Commiſſion* from the King by vertue of his *Supremacy* and *Prerogative Royal*, but was granted to the *Arch-Biſhop* of *Canterbury*, in the manner expreſſed in that Act.

A late Author has ſtretched this *Statute* to a Power of *diſpenſing* in other Caſes, beſides thoſe which depended on the *Canon-Law*. *For*, ſaith he, *the Pope uſurped ſuch a Power in derogation of the Authority Royal, and then that Power muſt be originally in the King; otherwiſe, in the Conſtruction of the Act, it could be no Uſurpation.* But this is a very falſe way of Reaſoning; *The* Pope *uſurped ſuch a* Power *on the Crown*; therefore *the Crown hath it of Right:* For the *Popes Uſurpations* were many of them *unreaſonable* (his *Primacy*, according to *Canons*, being allowed) and our Law did reſtore to the King the *ancient Right* and *Juriſdiction of the Crown*, and not put him into the *Poſſeſſion* of all the *extravagant Power* which the *Pope uſurped*. For this Law charges the Pope *with intolerable Exactions of great Sums of Money, in Penſions, Cenſes, Peter-Pence, Procurations, Fruits, Suits for Proviſions and Expeditions of Bulls, for Arch-Biſhopricks and Biſhopricks, and for Delegates and Reſcripts in Cauſes of Contentions and Appeals, Juriſdictions Legantine, as well as Diſpenſations, Licenſes, Faculties, Grants, Relaxations, Writs, called* Perinde valere, *Rehabilitations, Abſolutions*, &c. Now all theſe were Uſurpations in *Derogation of the Crown*; but doth it therefore follow that the *Crown* hath a *Right* to them all? But to go no further than the Buſineſs of *Diſpenſations*; Hath the King a Right by this Statute to *diſpenſe* as far as the Pope? The Pope uſurped

Viſitatorial Power, &c. p. 262.

uſurped a Power of *diſpenſing* in *Matrimonial Contracts*, in *Oaths*, in *Vows*, in ſome *poſitive Divine Laws*, which I ſuppoſe *H.* 8. by vertue of the *Supremacy*, never pretended to. So that it is a very miſtaken Notion of ſome Men, That *the King had all the* Power, *which the* Pope *uſurped*. And as to the *Act*, it is plain by the Words of it, That the *Original* Power *of Diſpenſing*, was lodged in the *King*, *Lords and Commons*, and the *Miniſterial Execution* of it with the *Arch-Biſhop of Canterbury*, even with reſpect to the King himſelf. But if the King had pretended to *all the* Power *which the* Pope *uſurped*, he muſt have diſpenſed with himſelf.

P. 266. But this Author offers to Prove, That *there is a* Power *in the Crown to diſpenſe with Acts of* Parliament, *even ſuch as concern the Conſecration of Biſhops; becauſe it is ſaid*, 8 Eliz. That *the Queen by her Supreme Authority had diſpenſed with all Cauſes or Doubts of any Imperfection or Diſability in the Perſons*, &c.

To give a clear Anſwer to this, we muſt conſider theſe Things;

1. That, 1 *Eliz.* 1. The Act of 25 *H.* 8. for the *Order* and *Form* of *Electing* and *Making Arch-Biſhops* and *Biſhops*, was revived; as appears by the ſame Act, 8. *Eliz.* 1. 7.

2. That by another Act, 1 *Eliz.* 2. The *Book of Common-Prayer and Adminiſtration of Sacraments and other Rites and Ceremonies of the Church of* England, *which were in uſe in the time of* 6 E. *and repealed by* Queen *Mary*, were re-inforced, 1 *Eliz.* 2. 2. and the *Repeal annulled*. But by the Act 5 and 6 *E.* 6. c. 1. §. 5. the *Form* and *Manner* of making *Arch-Biſhops*, *Biſhops*, *Prieſts*, *and Deacons*, *was added to the Book of Prayer*, *as of like Force and Authority with it*.

3. That the *Act* of *E.* 6. being revived with the expreſs mention of the *Alterations* and *Additions* made to it; there was no Neceſſity apprehended, 1 *Eliz.* to make a diſtinct *Act* for that which was in force already by the Name of *Additions therein added and appointed by that Statute*. And this, I conceive, was the true Reaſon why a Bill did not paſs, 1 *Eliz.* to that purpoſe: For, I find by the *Journals* of the *Houſe*, a *Bill* was prepared and read the third time in the Houſe of Lords; but upon Conſideration, it was laid aſide, as ſuperfluous.

4. That the *Popiſh Party* took Advantage of this, and pretended, That the *Book of Conſecration*, &c. *was not eſtabliſhed by Law, being not expreſly mentioned, and therefore the Biſhops made by it, were not Legal Biſhops*. And upon this *Bonner* reſolved to ſtand the Trial againſt *Horn*, Biſhop of *Wincheſter*, as may be ſeen in *Dyer*, *R.* f. 234., So that the *Papiſts* then ſtood upon it, That *the Crown could not diſpenſe with Laws*; otherwiſe *Bonner*'s *Plea* ſignified nothing. For if there were ſuch an Inherent Right

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in the Crown to *Diſpenſe with Laws* in *Eccleſiaſtical Matters*, then theſe were *Legal Biſhops*, having all the Queen's *Diſpenſing Power* for them.

5. The Clauſe in the Queen's *Letters Patents* for *Diſpenſing* with *Imperfections* and *Diſability*, was put in out of *abundant Caution*, and not for any *Neceſſity* that we can find: But it was Cuſtomary in the *Popes Bulls* to put in ſuch kind of *Clauſes*; and therefore they would omit no *Power* in that Caſe, which the *Pope* did pretend to; which the Act ſaith, was *for avoiding all Ambiguities and Queſtions*.

6. But after all, leſt there ſhould be any Colour for *Diſputing* this Matter left, according to the expreſs Letter of the Law, therefore it was declared, 8 *Eliz.* 1. 3. That not only the *Book of Common-Prayer*, but the *Form* of *Conſecrating Archbiſhops, Biſhops*, &c. *which was ſet forth in* Edward *the Sixth's Time, and added to the Common-Prayer, ſhall ſtand and be in full Force and Effect: And all Acts done by it, are declared to be Good and Perfect to all Intents and Purpoſes:* So that this *Act* of *Parliament* doth rather overthrow a *Diſpenſing Power*; for if there were then ſuch a *Supreme and Abſolute Power* in the *Crown*, as to *Eccleſiaſtical Matters*, what need ſuch an *Act of Parliament* to Confirm and Ratifie what our Author ſuppoſes done by virtue of it?

But to return to the 25th of *H.* 8. In the ſame *Act* of *Parliament*, care is taken for the *Viſiting Exempt Places*, as *Monaſteries, Colledges and Hoſpitals*, by a particular *Commiſſion* under the Great Seal.

But that which comes neareſt to our Buſineſs is, That 26 *H.* 8. *c.* 1. another Act paſſed, wherein *the King's Supremacy is acknowledged, and a Power given by Act of Parliament for him to Viſit, Redreſs and Amend all Errors, Hereſies, Abuſes, Contempts and Enormities whatſoever, which by any manner of Spiritual Authority or Juriſdiction ought or may lawfully be Reformed in any Uſage, Cuſtom, Foreign Laws, Foreign Authority, Preſcription, or any Thing or things to the contrary hereof notwithſtanding.*

If the King had this Power by virtue of his *Supremacy* and *Prerogative Royal*, can we imagin *H.* 8. ſo weak a Prince, and ſo little a valuer of his own *Prerogative*, as to have that given him by *Act* of *Parliament*, which was acknowledged to be in him before? But the Words are expreſs, *And that our Sovereign Lord*, &c. *ſhall have full Power and Authority from Time to Time to Viſit*, &c. From whence it follows, That in the Judgment of *H.* 8. and the *Parliament*, ſuch a *Power* was not *perſo-*

nally inherent in him, but that it did belong to the *Legiſlative Power*; and therefore an *Act* of *Parliament* was required for it; ſo that the *Supremacy*, as then ſetled by *Law*, lay in a total rejecting any *Foreign Juriſdiction*, and governing this Church and Kingdom by our own Laws: Which is well expreſſed in the *Preamble* to the Act againſt *Appeals*, *viz. That this Realm of* England *is an Empire governed by one Supreme Head and King, having the Dignity and Royal Eſtate of the Imperial Crown of the ſame, unto whom a Body Politick, compact of all Sorts and Degrees of People, divided in Terms and by Names of Spiritualty and Temporalty, been bounden, and ought to bear, next to God, a Natural and Humble Obedience.*

By virtue of this Act *Cromwel* was made *Vicegerent* and *Vicar General*, (for both are in the ſame *Commiſſion*) and the King gave to him *omnem & omnimodam Juriſdictionem, Authoritatem ſive Poteſtatem Eccleſiaſticam, quæ nobis tanquam ſupremo Capiti hujuſmodi competit*, &c. which are the Words of his *Commiſſion*.

It's true, That the Power of granting a *Commiſſion* to exerciſe this Power, is not expreſſed in the *Act of Parliament*; but it being *veſted* in the *King* by the *Act*, he might appoint *One* or more *Commiſſioners* to do it in his name; but the Caſe is very different where that very *Power* of *Delegation* is taken away by *Act of Parliament*, for that is the preſent Caſe.

To make this clear, we muſt conſider the Words of this Act, and compare them with 1 *Eliz.* 1. the 17 *Car.* 1.12. and the preſent *Commiſſion*.

The Words, 26 *H.* 8. 1. are the ſame in effect with thoſe 1 *Eliz.* 1. But with this obſervable Difference, That whereas the *Statute* of *H.* 8. gives *the King his Heirs and Succeſſors full Power and Authority from Time to Time to Viſit*, &c. That of 1 *Eliz.* 1. unites the *Juriſdiction* to the *Imperial Crown of this Realm*; but then it doth not proceed as the other did, *To give full Power and Authority to her, her Heirs and Succeſſors, to viſit*, &c. but the Words are, *And that your Highneſs, your Heirs and Succeſſors Kings or Queens of this Realm ſhall have full Power and Authority by this Act, by Letters Patents under the Great Seal of* England *to Aſſign, Name and Authoriſe, when and as often as your Highneſs, your Heirs and Succeſſors ſhall think meet to Exerciſe, Uſe, Occupy and Execute under your Highneſs, your Heirs and Succeſſors, all manner of Juriſdictions, Priviledges and Preheminences, in any wiſe touching or concerning any Spiritual or Eccleſiaſtical Juriſdiction*, &c. ſo that the *Adminiſtration* of this *Extraordinary Juriſdiction* is by this Act limited to ſuch *who are nominated and appointed by the Letters Patents.* The Fountain of all *Juriſdiction* is acknowledged to be *in the Imperial*

Imperial Crown of this Realm, but the *Adminiſtration* is twofold; *Ordinary*, in the *Archbiſhops*, *Biſhops and Eccleſiaſtical Courts*; and to ſecure their Dependance on the Crown, the *Oath of Supremacy* is required by this Act to be taken by every *Archbiſhop*, *Biſhop*, and all *Eccleſiaſtical Perſons* and *Officers*. But beſides this, it was then thought fit, That there ſhould be an *Extraordinary Adminiſtration* of it, which is limited by this Act to ſuch *as ſhould be nominated and appointed in Letters Patents*, &c. and no other Reaſon can be given of the Change from what it was in the Time of *Henry* the Eighth, for it is not now placed *abſolutely*, as then, in the Queen, *her Heirs and Succeſſors*, but the *Juriſdiction* is annexed to the *Crown*, and the *Extraordinary Adminiſtration* to be by *Commiſſion* under the Broad Seal.

Now ſince this *Power* of *nominating Commiſſioners for Extraordinary Juriſdictions* is taken away by *Act* of *Parliament*, the only Queſtion is, Whether notwithſtanding the *Right of Juriſdiction* being ſtill in the *Crown*, a *new Commiſſion* may not be granted for *Extraordinary Juriſdiction?*

There had been no Queſtion in this Caſe, if the *Adminiſtration* of *Extraordinary Juriſdiction* had not been ſetled 1 *Eliz.* 1. to be by *Commiſſion*, and that very *Power of granting ſuch a Commiſſion* had not been taken away by *Act* of *Parliament*.

But as the Matter now ſtands, the only Pretence left for it is, *That the ſame Act which confirms the Repeal, hath a Salvo for the King's Supremay*, in theſe Words; *Provided always, That this Act ſhall not extend, or be conſtrued to extend to abridg or diminiſh the King's Supremacy in Eccleſiaſtical Matters or Affairs*. If theſe Words be taken ſtrictly, with Reſpect to the ſame Matter, they make the *Act* inconſiſtent with it ſelf: For then the meaning would be, The *King's Supremacy* ſhall not extend to the ſetting up ſuch a Court, always provided, that his *Supremacy*, notwithſtanding this Act, may extend to the ſetting up ſuch another Court. Is it conſiſtent with the Wiſdom of a Parliament to make ſuch deluſory Acts? Therefore we muſt underſtand the *King's Supremacy in other Matters*. And there was this Reaſon for it, All the *Acts* of *Parliament* touching the *Supremacy* in *Henry* the Eighth's Time were repealed by Queen *Mary*, and the *Reſtoring* the *Supremacy* to the *Crown* was by the ſame Act which ſet up the *High Commiſſion*; and therefore when

when part of that Act was *Repealed*, and that *Repeal confirmed*, it was fitting to add a Clauſe, That there was no intention to abridg or diminiſh the *Supremacy ſetled by Law*, eſpecially, ſince by that *Act* the *Ordinary Juriſdiction* of the *Biſhops in their Courts was revived:* And it is very well known, what Clamors had been made, As though the *Biſhops Courts* being held *in their own Names* were inconſiſtent with the *King's Supremacy*; and although the Judges had declared, *July* the firſt 1637. *That there was no neceſſity that Proceſſes Eccleſiaſtical ſhould be in the King's Name; and the King*, Auguſt *the eighteenth*, *in* 13 Car. 1. *publiſhed a Proclamation to that purpoſe:* Yet all this did not ſatisfie ſome, but the Biſhops were ſtill thought by them, in their *Ordinary Juriſdiction*, to uſurp upon the *King's Supremacy* and *to abridg and diminiſh it*; therefore when this Act paſſed to *revive* their *Juriſdiction*, it was no more than reaſonable to add ſuch a Clauſe to prevent Miſconſtruction, *viz. That this Act*, *nor any thing in it*, *be conſtrued to extend to abridg or diminiſh the King's Supremacy in Eccleſiaſtical Matters*; as the *Ordinary Juriſdiction* of the Biſhops had been thought to do.

Vindication *Eccleſ. Com.* p. 19.

And the *Vindicator* of the *Eccleſiaſtical Commiſſion*, could not forbear a *Marginal Note* to that purpoſe. *The Court held by his Majeſties Eccleſiaſtical Commiſſioners, is more legal than the Biſhops Courts*; *This is in the Kings Name, theirs in their own Name only:* As though the new ſetting up a Court, forbidden by Law, did not make it illegal, in whoſe *Name* ſoever it were; and as though *Courts* expreſly owned and allowed by Law, were *illegal*, meerly becauſe the *Forms* of their *Proceedings* do not run in the *Kings Name*. But I deſire him to take an Anſwer from his own *Oracle* the *L. Ch. J. Coke*, *Co.* 5 *R.* f. 39. *Now albeit the Proceedings and Proceſs in the Eccleſiaſtical Courts, be in the Name of the Biſhops*, &c. *it followeth not therefore, that either the Court is not the Kings, or the Law, whereby they proceed, is not the Kings Law. For taking one Example for many, every Leet or view of Frank Pledge holden by a Subject, is kept in the Lords Name, and yet it is the Kings Court, and all the Proceedings therein are directed by the Kings Laws; and many Subjects in* England *have and hold Courts of Record, and other Courts, and all their Proceedings be according to the Kings Laws and Cuſtoms of the Realm.*

But there is a Material Objection or two yet to be anſwered.

1. It

1. It is Objected, That 2 *Jac.* *the Judges declared in the* Star-Chamber, *That the Deprivation of Non-conformiſts, was lawful, becauſe the King had ſupreme Eccleſiaſtical Power, which he hath delegated to the Commiſſioners, whereby they had Power of Deprivation by the Canon-Law of this Realm; and the Statute of* 1 Eliz. *doth not confer any new Power, but explain and declare the ancient Power: And therefore they held it clear, that the King without a Parliament might make Orders and Conſtitutions for the Government of the Clergy, and might deprive them, if they obeyed not.* 2 *Cr.* f. 37. *Moor,* f. 755. *Noy,* f. 100.

To which I anſwer,

1. Our Queſtion is not, Whether the King, without a *Parliament*, may not require the *Obſervation* of *Canons* paſſed *the Convocation*, ſo as to deprive the *Obſtinate*, by Vertue of his *Supreme Power* in *Eccleſiaſtical Matters*; but whether he may appoint a *Commiſſion* with *Power to deprive* againſt an *Act of Parliament*; which hath taken away the *Legal Power* of any ſuch *Commiſſion.*

2. In matters of this nature, it is ſafer truſting the *Supreme Judicature* of the *Nation in Parliament*, than the *Extrajudicial Opinion* of *the Judges.*

And in this Caſe the Parliament hath declared it ſelf another way; as appears by the *Canons*, 1640. which were not only condemned in *Parliament* afterwards (which then might be imputed to the heat of the Times) but in the moſt *Loyal Parliament* after the King's Return, particular care was taken, that *neither the Canons of* 1640. *ſhould be confirmed, nor any other Eccleſiaſtical Laws or Canons, not formerly confirmed, allowed, or enacted by Parliament, or by the Eſtabliſhed Laws of the Land as they ſtood in* the Year of the Lord, 1639. Which implies, that the Senſe of the Parliament then was, that we are not to own any *Canons* but ſuch as were *confirmed, allowed,* or *Enacted by Parliament,* or by *the Eſtabliſhed Laws of the Land before* 1639. And therefore no new *Injunctions* without a *Parliament or Convocation*, can make the Clergy liable to a *Legal Deprivation.* No, not that which the Defender is ſo pleaſed with the thoughts of, *viz.* to *give their Aſſent and Conſent to the King's Declaration, on pain of Deprivation.* P. 14.

3. *The Temporalties of the Clergy, eſpecially the Biſhops,* are ſecured by *ſeveral Acts* of *Parliament* without a *Tryal at Law.* Which, becauſe I ſee none of our great *Lawyers* take notice of, I ſhall here ſet down.

Statut. pro Clero.

14 *Edward* the Third, *c.* 3. *We Will and Grant for us, and for our Heirs, that from henceforth We nor Our Heirs ſhall not take nor cauſe to be taken into Our Hands, the Temporalties of Archbiſhops, Biſhops,* &c. *or other People of Holy Church of what Eſtate or Condition they be, without a true and juſt Cauſe, according to the Law of the Land and Judgment thereupon given.*

25 *Edward* the Third, *c.* 6. The Title of the *Statute* is, *A Biſhops Temporalties ſhall not be ſeized for a Contempt.* And this was received for good Law, 9 *E.* 4. 28. *Br. Ord.* 12. *Reg. f.* 32.

Viſitatorial Power, &c. *p.* 302.

But a very late Writer tells the World, *That the Poſſeſſions of Eccleſiaſtical Perſons are but Conditional Freeholds; and although Abſolute Freeholds require a due Courſe of Law, yet Conditional do not*; ſo that if a Man chance to be deprived of his Office, his *Freehold* is gone.

This is touching *Clergymen's Freeholds* to purpoſe; and no doubt out of pure Zeal to the Church of *England*: But ſee the *Equity* and *Impartiality* of this Man!

Aſſurance of Abby-Lands, *p.* 164, 184.

He had undertaken before to give *Publick Aſſurance of Abby-Lands to the preſent Poſſeſſors:* And for what Reaſon? *Becauſe the Pope granted a Diſpenſation with a* non obſtante *to the Canon Law:* And yet in this Book he proves, That a *non obſtante* is *no ways binding to the Supreme Power;* ſo that no Man could more effectually overthrow his own *Aſſurance* than he hath done himſelf: For, ſaith he, *Preſent Sovereigns, whether King or Pope cannot bind their Succeſſors.* And again, *Acts of Graces and Favours are alterable and ſuſpendible at the Pleaſure of the Succeeding Sovereign:* Why then ſhould any be ſo weak as to think the *Plenitude of the Pope's Power* as to *Abby-Lands*, can be bound up by the Act of any former Pope? I confeſs the comparing theſe two Books together hath extreamly leſſened his *Aſſurance* of *Abby Lands* with me.

Viſitatorial Power, &c. *p.* 297, 298.

p. 200.

And his Anſwers to the *Power* of *Revocation* are ſo weak, that they come at laſt to no more than this, *It is a thing which cannot well be done at preſent, therefore there is no fear it ever ſhould be done.* Here is ſome *Security* at leaſt, till it can be done. But as to the *Poſſeſſions* of the Eccleſiaſtical Perſons of the *Church of England*, he endeavours to prove, That they can have no *Security* at all of their *preſent Poſſeſſions*, notwithſtanding any *Promiſe* or a *Legal Title:* For if, as he ſaith, *The King by his Para-*

Paramount Juriſdiction can make any Exceptions null; *and ſo void a ſolemn Oath, not to accept a Diſpenſation from that Oath*; *why ſhould he not as well make void any Promiſe of his own, when it hinders* (as he thinks) *a greater Good*, eſpecially if the *Prerogative cannot be bound?* But then, as to a *Legal Title*, that is the vaineſt thing imaginable, as to ſuch *Conditional Freeholds* which Clergymen have; for if the *Commiſſioners* deprive them by their Power *ab Officio & Beneficio*, *their Attendent Frehold*, ſaith he, *is gone, without any Courſe of Law.* And the *Defender* ſaith, *The Commiſſioners may deprive if Clergymen ſhould not aſſent and conſent to all contained in the King's Declaration, if he required it.* But it is to be hoped, That Princes will not take the Meaſures of *Juſtice*, and *Wiſdom*, and *Honour* from ſuch Men: We will therefore ſet aſide the *Omnipotent Engine* of a *non obſtante*, which doth not *batter* ſo much as it *undermines*, and conſider the *Legal Security* of theſe *Conditional Freeholds.*

p. 297, 298.

Defence, p. 24

I. *All Freeholds* are in ſome Senſe *Conditional*, or elſe they could never be *forfeited:* Which ſhews, that there are none *Abſolute*, with Reſpect to the Law. And as to their *Original* among us, it is agreed, That by the Ancient *Right* of *Tenures*, all *Fees* are *Conditional*; for they ſuppoſe *Fealty*, the non-performance whereof is *Felony:* Which is not that which is done *felleo animo*, as Sir *Edward Coke* trifles, but it is the ſame with *Falſhood* or *Treachery.* The Laws of *H.* 1. *c.* 5. *Si Dominus de Felonia vel Fide mentitus compellat hominem ſuum:* And in another Law, the puniſhment of *Felony* is *Forfeiture of the Land*, c. 43. and therefore the *Feudiſts* ſay, That *Felony* is *delictum Vaſalli adverſus Dominum*; From the *Gothick Fell* or *Fehl*, which ſignifies in general, *a Fault*; And in this Caſe, *the Breach of Truſt towards his Lord:* Of which ſort of *Felonies* the *Feudiſts* reckon up ſome twenty, ſome thirty, any one of which makes a *Forfeiture:* So that here is no ſuch mighty Difference, that the *poor Clergymen* muſt only have *Conditional and Attendant Freeholds*, as though other Men's were *Abſolute*, whereas Sir *Thomas Smith* affirms, *all in* England *are Fiduciary*, i. e. *Conditional Freeholders, beſide the King.* It is eaſie enough for any one to frame ſuch a *Diſtinction* of *Freeholds*; and to ſay, That theſe who have but ſuch a *Freehold* may be ejected, without any Trial at *Common Law:* But he ought to have ſhewed, That *Magna Charta* or the *Ancient Laws* made ſuch a Difference between *Eccleſiaſtical Freeholds* and others; which he hath not pretended to do; and therefore ſuch a Diſtinction ought not

Rep. *Angl.* l. 3. c. 10.

not to be allowed, especially since I have produced an *Act of Parliament* 14 *Edward* 3. c. 3. which saith, *That Clergymen shall not be ejected out of their Temporalties without a True and Just Cause, according to the Law of the Land:* This was none of those Statutes which are in Print, but never enrolled, for Sir *Robert Cotton* owns *the enrolment of it*, and that it was made into a *Statute*; and Mr. *Pryn* himself had nothing to object against it: But now it seems their *Conditional Freholds* may be taken from them without any due Course of Law.

Instit. 51.

Cottons Abr. p. 23.

II. There is more to be said concerning the *Rights* of *Ecclesiastical Persons* in *Colledges*, because they are *Lay Corporations*. For in *Appleford*'s Case it was declared to be *the Opinion of all the Judges in* Patrick's *Case*, *That a Colledge was a Temporal Corporation:* And therefore some notable Difference in Point of Law must be shewed, Why Men may be deprived of some *Freeholds* without *due Course of Law*, and not of others; for I cannot imagine, That *Colledges* being founded for the encouragement of Learning, should lay Men more open to *Arbitrary Proceedings*, than any other Legal Societies are: However, *Deprivation*, in *Coveney*'s Case, was agreed to be a *Temporal Thing*; and for that Reason *his Appeal was rejected, as not relating to a Matter of Ecclesiastical Jurisdiction, which was only provided for* 24. *and* 25. Henr. 8. But it was allowed, *That he might bring an Action at Common Law.* Our Author several times mentions this Case; but puts it off till he comes to Treat of *Appeals*, *i. e.* to the Place he knew it to be improper in. For the Question is not, Whether an *Appeal* doth lie to the King in *Chancery* in a Case of *Deprivation?* but, Whether there be not a *Remedy at Common Law*, if a Person be deprived of *a Free-hold without due form of Law?* And after a great deal of *Impertinency*, about the *manner of Appeals*, he at last concludes, *The Remedy had been at Common Law only*; which is clear giving up the Point. For then, in case a Person be deprived without due course of Law, of his Free-hold, he grants, that he is to have his Remedy at Law; and consequently that a *Deprivation* of such a *Free-hold* without *due Course of Law*, is not sufficient. For the *Law* provides no Remedy where there is no Injury done, nor just Cause to seek for Redress. And so I come to the second Objection; which is this;

Mod. Rep. f. 84.

Dier, f. 209.

p. 320.

p. 224.

2. That *to deny the Jurisdiction of this Court, is to deny the King's Supremacy; and that is a dangerous thing by the Law.*

The

The Caſe was this; Dr. *F.* of *Magdalen College* in *Oxford*, being ſummoned before the *Commiſſioners*, denied *the Authority of the Court, and perſiſted in ſo doing*; which our Author ſaith, *in another Kings Reign perhaps might have been interpreted a Queſtioning the very Supremacy it ſelf*; *which, how fatal it was to* John Fiſher, Biſhop *of* Rocheſter, *and Sir* Thomas Moor, *is worthy to be conſidered, both as a Demonſtration of our Kings Clemency, and that the Doctor hath not ſo much reaſon to complain of his hard Uſage.* *Viſitatorial Power*, p. 313.

The Meaning whereof is this, That if they had proceeded in Juſtice againſt him, he ought to have ſuffered as Biſhop *Fiſher* and Sir *Thomas Moor* did. This is more than *a bare Inſinuation*, That to deny the *Juriſdiction* of this Court, is to deny the *Kings Supremacy*; and that it is *meer Clemency* not to deal by them who do it, as *H.* 8. did by Biſhop *Fiſher* and Sir *Thomas Moor*.

But, 1. It is by no means evident, That thoſe two Perſons ſuffered meerly on that Account. For their *Attainder* in *Parliament*, was for refuſing *the Oath of Succeſſion*; and King *James* I. mentions the Words of Sir *Thomas Moor* to that purpoſe, which he ſpake to the Lords when he was condemned. And their *Attainder*, if I miſtake not, was in the ſame *Parliament* which made it *Treaſon* to deprive the King of his Dignity, Title or Name of his *Royal Eſtate*, and therefore could not be by an *Act* not then paſſed. King *James* his Works, p. 283.

But, 2. Suppoſe that they were at laſt proceeded againſt on the Act then paſſed, what is this to the preſent Caſe? when *Coke* ſaith, *This Act was twice Repealed.* And it is no *extraordinary Clemency*, not to be proceeded againſt by a Law that hath no force. 4 *Inſt.* f. 42.

3. The Statute in Force, 5 *Eliz.* c. 1. is againſt thoſe who *defend or maintain the Authority, Juriſdiction, or Power of the Biſhop of* Rome, *or of his See, heretofore claimed, uſed, or uſurped within this Realm, or by any Speech, open Deed, or Act, adviſedly, wittingly attribute any ſuch mannner of Juriſdiction, Authority, or Preheminence to the ſaid See of* Rome, *or any Biſhop of the ſame, for the time being, within this*

Realm. So that it cannot be denied, that there is occaſion for *his Majeſties Clemency*; but it is to another ſort of Men.

4. It is very hard ſtraining to make the denying the *Juriſdiction* of this *Court*, to be denying the *Kings Supremacy*, when a Perſon hath done all which the *Law* requires him to do towards owning the *Supremacy*. If he had ſaid Dr. *F.* had taken *Poſſeſſion* of his *Fellowſhip* there, without taking *the Oath of Supremacy*, which the Law requires, he had then indeed given ground to ſuſpect him for *denying the Kings Supremacy*; but to take no notice of thoſe who refuſed to do as the *Law* requires, and to talk thus of what *Severity* might be uſed to one that hath done it, looks in him neither like *Clemency* nor *Juſtice*.

5. It was always looked on, as a *Legal Right* to make *Exception* to the *Juriſdiction* of *a Court*, eſpecially when *newly eſtabliſhed*, without *Act of Parliament*, and to any ordinary Underſtanding, in *flat Contradiction* to it. It is very new Doctrine that in a Legal Government *Exceptio Fori* ſhall be interpreted a *Denial of ſupreme Authority*, which was not only allowed by the *Canon* and *Civil Laws*, but by the moſt Ancient *Common Lawyers* we have.

Bracton obſerves ſeveral things, which are material to this purpoſe.

Bract. l. 5 de Excep. c. 1. 1. The firſt *General Exception which is allowed*, he ſaith, is *contra Juriſdictionem*. *Exceptions* are either *dilatory* or *Peremptory*. Some that are only *dilatory*, as to the *Action*, may be *peremptory* as to the *Juriſdicton*. And theſe are to be put in *ante Litem conteſtatam, ad perimendum Judicium, ne procedat*. And the firſt of this ſort, are the Exceptions *contra Juriſdictionem, & contra Perſonas Judicantium, quibus deficit Autoritas judicandi*. So that he ſuppoſes, that ſuch who do not deny the Kings Supreme Authority, may have a *Legal and juſt Exception* againſt the *Authority* of a Court.

2. It

2. It was an allowable *Exceptio Fori* then, if any Lay-Perſons did take upon them to proceed by *Eccleſiaſtical Cenſures*. L. 2. c. 8. n. 9.

In *Eccleſiaſtical Cauſes*, ſaith he, *a Secular Judge hath no Cognizance, becauſe he hath not the Power of Coercion proper to them*, viz. *by Eccleſiaſtical Cenſures*; therefore, he ſaith, in his Cauſis pertinet Cognitio ad Judices Eccleſiaſticos. His Reaſon is, *Becauſe thoſe only are the competent Judges, who have the Power of Coercion proper to the Court.* And for the ſame Cauſe, *Eccleſiaſtical Judges* are not to interpoſe in *Secular Cauſes*, *cum jura ſint ſeparata & limitata.* And although the *Exemption* of *Eccleſiaſtical Perſons* from the *Civil Courts*, be certainly taken away by the *Acts of Supremacy*; yet it hath been ſtill alledged by our Divines, That *the Eccleſiaſtical Cenſures were ſtill reſerved to the Eccleſiaſtical Functions*; either in the way of *Ordinary* or *Delegate Juriſdiction.* If the *High Commiſſion* did ſeem to go further, then that Power being taken away by *Act of Parliament*, it muſt return to the *Ancient Courſe.*

3. *There muſt be a Legal Authority to conſtitute a Legal Juriſdiction.* L. 5. de Exc. c. 14.

Ad hoc quod rata ſint judicia, videre oportet an Juſtic. Warrantum habeat à Rege quod judicare poſſit. Si Warrantum non habuerit, non valebit quod coram eo actum fuerit, quaſi coram non ſuo judice, quia primo legi debet Breve Originale, & poſtmodum Breve per quod Juſticiar. conſtitutus eſt, & ſi nullum omnino habuerit, aut ſi habuerit non tamen ad manum, non erit ei parendum niſi ita forte ſit, quod Breve Originale de Juſticiaria ſua faciat mentionem, Bracton, *l.* 5. *De Except.* c. 14.

1. There muſt be a *Commiſſion* from the *King*, which muſt be read; and if either they have it not, or it be not at hand, the *Juriſdiction* is not to be owned, unleſs it be mentioned in the *Original Writ.* For *Commiſſions* in thoſe days were moſt commonly granted by *Writ*, ſaith the Lord *Coke.* 2 *Inſt.* f. 418.

But by *Bracton*'s Words, it appears, That commonly there was an *Original Writ* and a *Commiſſion* beſides; but ſometime

ſometime the *Commiſſion* was in the *Original Writ*, and then the reading of that was ſufficient.

Mirror de Juſtic. c. 3. §. 16. The *Mirror* ſaith, That *the Juriſdiction may be denied, if the ſeeing or hearing the Commiſſion be denied.*

2. The *Bounds* of the *Juriſdiction* muſt be expreſſed; and if thoſe be exceeded, he ſaith an *Exception* lies. Which ſignifies nothing unleſs the *Commiſſion* be known.

L. 3. *de Actionc.* 9. *n.* 3. 3. The *Commiſſion muſt be according to Law*; For that is *Bracton*'s ſtanding Rule: *Nihil aliud poteſt Rex in Terris, cum ſit Dei Miniſter & Vicarius, niſi id ſolum quod Jure poteſt.* So that a *Commiſſion* againſt *Law* is void *in Law.* He mentions the Common Saying in the Civil Law, *Quod Principi placet, Legis habet Vigorem*; and anſwers it thus, *Quod Principi placet* is not to be underſtood of his *Preſumptive*, *but his Legiſlative Will* (Animo condendi Jura) and with the *Advice of his Magiſtrates*, the King himſelf giving Authority; which is the Deſcription of an Act of Parliament, as we now call it.

L. 1, *c.* 1. *n.* 2. Which he more fully expreſſes elſewhere, *Legis vigorem habet, quicquid de Conſilio & de Conſenſu Magnatum, & Reipublicæ Communi ſponſione, Authoritate Regis, ſive Principis præcedente, juſte fuerit Definitum & Approbatum.*

If this were the *Ancient Law of* England, how comes the *Exception* againſt a *Court* to be a Denial of the *King's Supremacy*; unleſs it be ſuppoſed impoſſible, That there ſhould be an *Illegal Court* with the *King's Commiſſion?*

But we may ſuppoſe it poſſible for a new kind of *Star-Chamber*, or *Court of Wards* to be ſet up; muſt no Man queſtion the *Legality* of ſuch a *Court*, without *denying the King's Authority?* For this is a Queſtion in *Point of Law.* And the *King's Authority* always goes *with the Law*: and therefore to ſuppoſe it to be in any thing againſt *Law*, is to ſuppoſe it to be *contradictory* to it ſelf.

But

But our Author ſaith, *It is neceſſary for every Court to aſſert its own Juriſdiction.* Very true, and to *clear* it too; if it be liable to a *juſt Exception.* I am very far from denying *the King's Supremacy*; yet I may be as far from thinking ſuch *a Court* to be *Legal*, if an *Act* of *Parliament* can make a *Court Illegal*; and to ſay no more for it, *but that every Court muſt aſſert its own Juriſdiction*, is to level it with the Infamous *High Court of Juſtice*; which when *King Charles* the Firſt, of *Bleſſed Memory*, denied their *Authority*, all the *Reply* was, *That the Court was ſatisfied of its own Authority*; Which could give *Satisfaction* to no Body elſe. P. 313.

And if this be all can be ſaid for the *Legality* of it, for all that I can ſee, there is *juſt Reaſon* to deny it.

F I N I S.

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